

The Family Law Canon in a (Post?) Racial Era

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While the debate about a post-racial society rages, our justice system continues to operate in a way that is race-conscious. It seems as though most of the discussion about race and the justice system concerns criminal justice, juvenile justice, education, and immigration. But race-consciousness also impacts family law. Nonetheless, the family law canon does not scrutinize race-based disparities in laws, procedures, and outcomes, and that omission feeds a mistaken notion of a race-blind or a post-racial society. One consequence of this omission is that it obscures race-based decision making by legislatures, judges, legal reform organizations, legal scholars, lawyers, and child welfare workers, and thereby immunizes race-based decision making from scrutiny. This Article suggests that the family law canon inaccurately describes a race-neutral or post-racial state for family law and that the canon should correct its colorblindness so that legal authorities can address the problems that structural racism creates for African-American families. Part I of this Article explores the family law canon and some of the examples that legal authorities and scholars constantly employ to minimize the distinctions that family law currently makes on the basis of race. Part II disputes the colorblind canonical story by showing that the law does not protect the autonomy of African-American families as much as it does that of white families. This section also explains why it matters that the family law canon has it wrong with respect to African-American families: in short, colorblindness immunizes racism and perpetuates inequality. Part III discusses why family law scholars—both those who advocate color consciousness and those who advocate colorblindness—tend to oversimplify the precedent that addresses the role of race in family law. The Article concludes by emphasizing the importance of legal scholarship that challenges the family law canon and invites family law scholars to broaden and challenge the canon.

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With Barack Obama's historic election to the Presidency of the United States, public discourse has focused on the idea of a "post-racial" society, or a "society in which race is no longer meaningful."¹ Ironically, the election fueled enthusiastic debate about the arrival of a post-racial era in the United States, while highly-racialized conflicts continue to dominate the public consciousness. The infamous arrest of Harvard Professor Henry Louis Gates,

¹ Ralph Richard Banks, *Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACKLETTER L.J. 41, 41 (2009); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1024 (2010) [hereinafter Haney López, *Post-Racial Racism*] ("The election of Barack Obama to the presidency has inspired many to marvel at the seeming evaporation of race as a basis for social ordering in the United States, a euphoria often expressed in proclamations that we now live in a 'post-racial' America.").

for example, dominated public discourse as it became highly racialized.² And a Republican congresswoman's recent statement about the GOP's search for a "great white hope," not to mention the recent hurling of racial epithets at Representatives John Lewis and Andre Carlson by people gathered at the Capitol to protest health care reform, evoke anti-black sentiment from the early 1900s.³

The term "post-racial" signifies that race has been eliminated as a significant factor in the ordering and operation of U.S. society. The term means that the United States has "moved beyond race" and indeed has "transcended race."⁴ The idea of a post-racial era is one in which the "nation [has] unburdened itself of the albatross of race."⁵ Stanford Professor Richard Banks explains that "the election of Barack Obama does unsettle a longstanding narrative in which racism looms as an implacable and

² See Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES, July 21, 2009, at A13.

³ Paul Kane, *'Tea Party' Protesters Accused of Spitting on Lawmaker, Using Slurs*, WASH. POST (Mar. 20, 2010, 10:25 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/20/AR2010032002556.html>. Congresswoman Jenkins stated that "Republicans are struggling right now to find the great white hope." John Hanna, *Jenkins: 'Great White Hope' Remark Not About Obama*, NEWSVINE.COM (Aug. 27, 2009, 10:47 AM), http://www.newsvine.com/_news/2009/08/27/3198014-jenkins-great-white-hope-remark-not-about-obama. The phrase "great white hope" is often associated with pre-Civil Rights Era racism and is thought to have become a commonly used phrase in the early twentieth century when white heavyweight boxer Jim Jefferies was lured out of retirement to fight an African-American boxer, Jack Johnson. See, e.g., Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 73 (1996) (discussing the origin of the phrase "Great White Hope"); Kathryn Russell-Brown, *Black Protectionism as a Civil Rights Strategy*, 53 BUFF. L. REV. 1, 9 (2005) (discussing the origin of the term "great White hope"). Other incidents that contradict the idea that we are in a post racial era are: Congressman Robert Bennett's prediction in 1999 that "George W. Bush's presidential nomination was secure unless 'some black woman [came] forward with an illegitimate child'"; the 2006 U.S. Senate election campaign of Harold Ford, Jr., in which opponents "aired commercials that drew attention to his interracial dating history"; and the reality that "Alabama only removed the antimiscegenation provision from its state constitution in 2000, with 40 percent of voters wishing to maintain the moribund provision." Kevin Noble Maillard, *Miscegenation: An American Leviathan*, 36-SUM HUM. RTS. 15 (2009) ("Even in the age of President Barack Obama, the son of an African Father and a white woman from Kansas, American patterns of interracialism have remained relatively static. Interracial marriages still account for fewer than 5 percent of all marriages.").

⁴ See Banks, *supra* note 1, at 41–42; see also Frank Rich, Op-Ed., *The Grand Old White Party Confronts Obama*, N.Y. TIMES, Feb. 17, 2008, at 13, available at <http://www.nytimes.com/2008/02/17/opinion/17rich.html>.

⁵ Phillip Morris, *America Begins Its Journey into a Post-racial Era*, CLEV. PLAIN DEALER, Nov. 6, 2008, at A1.

unyielding impediment to African-American advancement.”⁶ Similarly, sociologist Shelby Steele observes that “Obama’s post-racial idealism told whites the one thing they most wanted to hear: America had essentially contained the evil of racism to the point at which it was no longer a serious barrier to black advancement.”⁷ As Professor Cornel West notes, the term “post-racial” declares that “[r]ace doesn’t exist. We’re colorblind.”⁸

While the debate about a post-racial society rages, our justice system continues to operate in a way that is race-conscious. While it seems as though most of the discussion of race and the justice system concerns criminal justice,⁹ juvenile justice,¹⁰ education,¹¹ and immigration,¹² race-

⁶ Banks, *supra* note 1, at 47.

⁷ Shelby Steele, Op-Ed., *Obama’s Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008, at 31.

⁸ Harold McNeil, *West Discusses Obama’s Victory*, BUFF. NEWS, Nov. 7, 2008, at D10 (quoting Professor Cornel West).

⁹ See Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1424–29 (1988) (arguing that the lower rate of imposition of the death penalty when victims are black violates the equal protection rights of the black community); Haney López, *Post-Racial Racism*, *supra* note 1, at 1023 (using “racial disparities in the American crime control system to assess race and racism as key features of contemporary society”); Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 16 (2002) (discussing the role of race in the application of the death penalty).

¹⁰ See Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 532–44 (2009) (discussing the role of race in the increased punitiveness of the juvenile justice system and the disparate impact of harsher policies on black youth); Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 13, 25–42 (2007) (attributing more stringent youth crime policies to “the politics of race and crime” and examining the racial disparities in the punishment of black youth).

¹¹ See Tona M. Boyd, Symposium Response, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 571, 573–74 (2009) (discussing “the racially disparate trend in [school] disciplinary practices” and noting that it disproportionately feeds black students into the school-to-prison pipeline); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 131 (2007) (considering the effect of the Supreme Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* on school integration).

¹² See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 326 (2002) (stating that “[s]tereotypes about Arabs and Muslims have influenced immigration law and its enforcement, as well as the civil rights of Arab and Muslim noncitizens in the United States”); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 677 (2000) (contending

consciousness also impacts family law.¹³ Nonetheless, the family law canon does not scrutinize race-based disparities in laws, procedures and outcomes, and that omission feeds a mistaken notion of a race-blind or a post-racial society.¹⁴ One consequence of this omission is that it obscures race-based decision making by legislatures, judges, legal reform organizations, legal scholars, lawyers, and child welfare workers, and thereby immunizes race-based decision making from scrutiny. In other words, since the family law canon inaccurately describes family law as post-racial, or colorblind, the canon immunizes racism and perpetuates racial inequality.

This Article suggests that the family law canon inaccurately describes a race-neutral or post-racial state for family law, and that the canon should correct its colorblindness so that legal authorities can address the problems that structural racism creates for African-American families.¹⁵ In other words, when we teach and write about family law, we fail to adequately and accurately discuss how law impacts African-American families, and thus

that “[r]ace-based [immigration] enforcement deserves special scrutiny because it disproportionately burdens persons of Latin American ancestry in the United States”).

¹³ See Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 31–40 (2008) (examining the differences in how the law governs the interracial adoptions of Indian children and the interracial adoptions of non-Indian children such as black children); David D. Meyer, Lecture, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL’Y 183, 188 (2007) (discussing the role of race in adoptions and child custody decisions). While any definition of family law is bound to be inherently under- and over-inclusive, I find that Professor Hasday’s definition continues to capture the state of family law: “[F]amily law regulates the creation and dissolution of legally recognized relationships, and/or determines the legal rights and responsibilities of family members.” Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 871 (2004) [hereinafter Hasday, *The Canon of Family Law*].

¹⁴ For a thorough and persuasive discussion of the history of colorblindness, see generally Ian F. Haney López, *“A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) [hereinafter Haney López, *“A Nation of Minorities”*].

¹⁵ While the focus of this Article is on African-Americans, the family law canon is similarly post-racial with respect to other races and ethnicities, as well. For example, why do we not discuss in the typical family law course how immigration laws effectively determine the rights and responsibilities of family members of some races and ethnicities more than others? Similarly, why do we not discuss how laws privilege a particularly ethnocentric conception of a nuclear family, and how that affects racial groups and ethnic groups differently? Unfortunately, the protection that one’s family receives directly varies with one’s race and ethnicity (not to mention socioeconomic status, citizenship status, sex, or whether someone is able-bodied). While the popular narrative—the one that is taught in most family law courses—is one that reflects colorblind equality for all, and one in which family law no longer makes distinctions based on race, this narrative has blinded us to the realities of racial family law hierarchies in society.

family law has the appearance of being post-racial.¹⁶ But, as I suggest throughout this Article, this would change if we changed the family law canon. The argument here proceeds as follows: Part I explores the family law canon and some of the examples that legal authorities and scholars constantly employ to minimize the distinctions that family law currently makes on the basis of race. Part II disputes the colorblind canonical story by showing that the law does not protect the autonomy of African-American families as much as it does that of white families.¹⁷ This section also explains why it matters that the family law canon has it wrong with respect to African-American families: in short, colorblindness immunizes racism and perpetuates inequality. Part III discusses why family law scholars—both those who advocate color consciousness and those who advocate colorblindness—tend to oversimplify the precedent that addresses the role of race in family law. The Article concludes by emphasizing the importance of legal scholarship that challenges the family law canon and invites family law scholars to broaden and challenge the canon.

I. THE FAMILY LAW CANON

A. *Defining Family Law*

A canon is a way of thinking about a certain area of the law that is generally accepted within the legal community and defines that area of the law.¹⁸ What makes something canonical is, in part, its continued presence in

¹⁶ Some scholars, including Rachel Moran, Randall Kennedy and Robin Lenhardt, have explored the relationship between family law and race. See, e.g., RANDALL L. KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003); RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001); R.A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp*, in *RACE LAW STORIES* (Rachel F. Moran & Devon W. Carbado eds., 2008); Rachel F. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 WIS. L. REV. 239 (2007). Thus, I refer to some of these works in my appendix, as suggestions of works that should be included in family law courses to ensure that the family law canon does not remain colorblind. See *infra* Appendix. The point is not that there are no scholars who write about the significance of race to family law. The point is that this scholarship is not part of the family law canon.

¹⁷ This Article does not take issue with legitimate and lawful interventions that are designed to protect family members from violence, abuse, or neglect. The purpose of this Article is to expose the fact that these interventions are, in some cases, based at least in part on race, rather than legitimate and lawful factors, and that the family law canon ignores these cases.

¹⁸ See J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 984–85 (1998) (discussing the deep “canonicity of certain ways of thinking, talking, and arguing” that are “an important part of what makes canons

the foundational texts, stories, assumptions, problems, and narrative frameworks in minds of successive generations.¹⁹ This includes its presence, therefore, in family law scholarship, casebooks, and jurisprudence. While it is widely accepted that there are canons in some areas of the law, such as constitutional law, contracts, and property law,²⁰ the canon of family law has only to date been explored directly and critically²¹ by Professor Jill Hasday in *The Canon of Family Law*, which appeared in the Stanford Law Review in 2004.²² Nonetheless, the family law canon is tremendously important

constitutive of a particular culture or a particular discipline” such as law); Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187, 187 (2000) (describing a canon as “a set of themes that organize the way in which people think about [a] discipline”).

¹⁹ See LEGAL CANONS 3 (J.M. Balkin & Sanford Levinson eds., 2000); see also Hasday, *The Canon of Family Law*, *supra* note 13, at 825–26 (arguing that canons include the notion of a “set of foundational texts that exemplify, guide, and constitute a discipline,” and also recognizing that it is generally accepted among legal authorities and legal scholars that stories and examples can be included in a canon). Balkin suggests a similar mode of transmission in his work on the transmission of cultural knowledge from one generation to the next. See J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 42–90 (1998).

²⁰ See LEGAL CANONS, *supra* note 19, at 8, 47, 66.

²¹ While Professor Hasday’s article is the first to explore the family law canon directly and critically, we can also use family law casebooks to reflect on the canon. Casebooks help compose the canon, but their authors’ decisions are implicit—we can only see the product of their deliberations (the casebook), rather than some account of their decision making processes. Thus, this Article is an invitation of sorts to dialogue with family law scholars in a way that may ultimately broaden and challenge the canon. We can do so by making our implicit decisions explicit and then questioning, critiquing, and reassessing the canon and how we transmit it to law students.

²² See generally Hasday, *The Canon of Family Law*, *supra* note 13. Hasday notes that the lack of scholarly work on the family law canon reflects the relatively low status of family law in the legal academy, and, for that matter, in the legal profession. *Id.* at 828 n.4. Hasday rightly recognizes that this is puzzling, given, *inter alia*, the place of family law in structuring people’s lives, including the lives of their children. *Id.* It is indeed puzzling, particularly because family law often involves complex interaction between very complex areas of the law, i.e., constitutional law and tax law. See *id.* (“[S]ome students may bring a bias against [family law] because it does not enjoy the prestige of, say, antitrust—although the total number of antitrust cases in one year makes up a good day’s work in an urban domestic relations court.” (quoting LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW, at xxxv (2d ed. 2000))); *id.* (“While [family law] is a course that students like to study, many consider it less difficult and less serious than courses in commercial law, constitutional law, or taxation. Some consider family law a ‘marginal’ course rather than part of the ‘core’ curriculum.” (quoting WALTER O. WEYRAUCH ET AL., CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS 1 (1994))); *id.* (“Family law is . . . ‘underneath’ other areas of the law. Its low status within the profession is well-known.” (quoting Martha Minow, “Forming Underneath Everything that Grows:” *Toward a History of Family Law*, 1985 WIS. L.

because it effectively determines the parameters of any family law debate.²³ If the canon is inaccurate, it diverts attention from what is really at stake. By defining the appropriate terms of a family law debate, the family law canon either forces us to confront the legal (and practical) consequences of the words that we use, or allows us to ignore these legal and practical consequences.²⁴

If the stakes are so high, why have so few directly and critically explored the family law canon? Canons are not often challenged, in part, because they operate at the level of "common sense, powerful enough, that [their] tenets are taken to require no reappraisal."²⁵ The virtual absence of discussion about the canon of family law speaks volumes about its power.²⁶

Professor Hasday argues that "the family law canon misdescribes both the content of family law and its governing principles."²⁷ In particular, Hasday challenges three of the most prominent themes of the family law canon.²⁸ First, she explores the relationship between family law and social inequality and argues that the canon overstates the changes that have occurred over time and understates the distinctions that family law currently makes between families based on social class.²⁹ This construction of the family law canon, according to Hasday, has allowed legal authorities to argue that family law does not perpetuate the oppressed status of historically oppressed people.³⁰ Hasday then looks at the relationship between family law and federalism, and disputes the canon's contention that family law has always been a local matter.³¹ This particular aspect of the family law canon has allowed legal scholars and other authorities to oppose certain attempts at federal family law on the basis that federal family law is, by definition, inappropriate and unprecedented. Lastly, Hasday explores the relationship between family law and welfare law and refutes the canon's contention that family law and welfare law are wholly separate categories.³² Historically, Hasday explains, this construction of the family law canon has allowed

REV. 819, 819 (1985))).

²³ Hasday, *The Canon of Family Law*, *supra* note 13, at 836.

²⁴ See RICHARD A. POSNER, *OVERCOMING LAW* 178 (1996) (arguing that analogic reasoning "is not reasoning but is at best preparatory to reasoning").

²⁵ Hasday, *The Canon of Family Law*, *supra* note 13, at 827.

²⁶ Inertia may also be at work here. Casebooks are typically republished for many years with only incremental "news" oriented amendments.

²⁷ Hasday, *The Canon of Family Law*, *supra* note 13, at 830.

²⁸ *Id.*

²⁹ *Id.* at 830, 833-71.

³⁰ *Id.*

³¹ *Id.* at 831-32, 870-93.

³² *Id.* at 832, 892-98.

authorities to avoid having to justify why family law applies very different rules to the regulation of rights and responsibilities of poor families than it does to other families.³³

This Article builds on Professor Hasday's work and explores another theme that the family law canon misrepresents: the relationship between family law and race. While the family law canon includes the right to privacy, marriage, nonmarital families, adoption, domestic violence, divorce, division of marital property, alimony, child support, and child custody, it typically does not include a discussion of these topics in a way that accurately describes the relationship between family law and race. In other words, the way that we teach family law gives the appearance that family law is post-racial—an appearance that should change to reflect reality. Furthermore, and particularly important for the purposes of this Article, the family law canon fails to include child welfare and welfare law, and the relevance of these areas of the law for African-American families.³⁴ Child welfare and welfare law are not generally taught within a standard family law course, notwithstanding the fact that they are unambiguously family law in that they regulate “the creation and dissolution of legally recognized relationships, and/or [determine] the legal rights and responsibilities of family members.”³⁵

While Hasday identifies race and sexual orientation as areas in which the canon of family law understates the distinction that it still makes between families,³⁶ this Article builds on Hasday's work by exploring the canon of family law in depth as it relates to African-Americans.³⁷ As a general matter, this Article suggests that the family law canon has allowed legal authorities to avoid explaining why family law may employ different policies to regulate

³³ Hasday, *The Canon of Family Law*, *supra* note 13, at 832, 892–98.

³⁴ See *infra* Part II.

³⁵ *Id.* at 871.

³⁶ *Id.* at 854–61.

³⁷ When I refer to blacks, African-Americans, or black-Americans, I am referring both to a physical and sociocultural concept of race. Practically speaking, I am referring to those whom others would identify as African-American and to those who would self-identify as African-American. For a further discussion of the concept of race, see Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL'Y 1, 3 n.2 (2008) (discussing the evolution of race as a sociocultural concept). For this Article, I have limited my explicit discussion to African-Americans and family law, but it is important to note that the way that Latinos, Native Americans, and Asians interface with family law is also affected by an individual's racial and ethnic background. For an analysis of the extent to which society and law work together to maintain heterosexual and monoracial couples as the normative center, see Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 234 (2009).

families based on their race. In other words, the family law canon has lulled the legal community into believing that race is no longer a factor in the creation or dissolution of legally recognized relationships and no longer determines the legal rights of family members. As this Article explains below, a more accurate account of the relationship between family law and race suggests that we are decidedly not a post-racial family law society.³⁸

B. *The Family Law Canon Is Colorblind*

1. *Loving and Palmore*

Loving v. Virginia,³⁹ statutes governing interracial adoption, and *Palmore v. Sidoti*⁴⁰ are the canonical examples that legal authorities and scholars constantly employ to support the notion that family law no longer draws racial distinctions. After the Civil War, statutes prohibiting interracial marriage (commonly referred to as antimiscegenation⁴¹ laws) became widespread.⁴² Then, in 1967 the Supreme Court held in *Loving v. Virginia* that antimiscegenation laws violate the Fourteenth Amendment to the United States Constitution.⁴³ Now, “legal scholars consistently identify *Loving* as one of the most crucial decisions in family law, illuminating family law’s nature and core values.”⁴⁴ Eskridge asserts that “[n]o respectable scholar disputes the correctness of *Loving*,”⁴⁵ and Randall Kennedy asserts that “any constitutional theory that cannot support [*Loving*’s] result is a constitutional theory that should not be supported.”⁴⁶

The hallowed place of *Loving* in the work of legal scholars and legal authorities is significant because scholars use the example of interracial

³⁸ See Haney López, *Post-Racial Racism*, *supra* note 1, at 1023–24 (considering mass imprisonment from a racial stratification theory and arguing for a renewed focus on “post-racial” racism).

³⁹ 388 U.S. 1 (1967).

⁴⁰ 466 U.S. 429 (1984).

⁴¹ For a discussion on the origin of the term “miscegenation,” see Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1343 n.166 (1998).

⁴² See *id.* at 1345; Hasday, *The Canon of Family Law*, *supra* note 13, at 854; Emily Field Van Tassel, “Only the Law Would Rule Between Us”: Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War, 70 CHI.-KENT L. REV. 873, 903–04 (1995).

⁴³ *Loving*, 388 U.S. at 2.

⁴⁴ Hasday, *The Canon of Family Law*, *supra* note 13, at 854–55.

⁴⁵ *Id.* at 855 (quoting WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 109 (1996)).

⁴⁶ *Id.* (quoting RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 278 (2003)).

marriage generally, and *Loving* specifically, to show that family law no longer draws distinctions between families based on race.⁴⁷ Some scholars use *Loving* as an example of the way in which the state is prohibited from “insist[ing] that race count as a factor in the ordering of people’s most private lives,”⁴⁸ and as furthering the idea that “all invidious governmental racial classifications would be subjected to strict scrutiny and almost always struck down.”⁴⁹ Similarly, scholars observe that “[i]n the post *Loving* regime, at least in terms of race . . . no one has to worry about governments . . . thwarting desires to marry,”⁵⁰ and that pursuant to *Loving*, “the boundaries of

⁴⁷ *Id.* at 857 (“Scholars use the example of interracial marriage to stress how family law no longer draws distinctions between families [based on race].”); see also *Dean v. District of Columbia*, 653 A.2d 307, 359, 362 & n.2 (D.C. 1995) (holding no denial of equal protection in refusing to allow same-sex individuals to marry, citing *Loving* as rejecting the idea that refusing to grant the ability to marry to same-sex couples “is ‘akin to’ the discredited notion that ‘a divine natural order forbids racial intermarriage,’ a notion which the Supreme Court quite properly laid to rest in *Loving v. Virginia*”); *Cote-Whiteacre v. Dep’t of Pub. Health*, 844 N.E.2d 623, 660 (Mass. 2006) (Ireland, J., dissenting) (citing *Loving* for the proposition that *Loving v. Virginia* “removed race as an impediment [to marriage]”); *Andersen v. King Cnty.*, 138 P.3d 963, 977 (Wash. 2006) (citing *Loving* for the proposition that “the freedom of choice to marry not be restricted by invidious racial discrimination”). While clearly in the minority, there are a few commentators who have suggested that *Loving*’s holding contains some ambiguity about the use of race in making distinctions in the family law context. See John Hart Ely, *If at First You Don’t Succeed, Ignore the Question Next Time? Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT. 215, 215–16 (1998) (“The *Loving* opinion was devoted in its essential entirety to reciting the facts and explaining why such laws hadn’t been validated by history. Not a word was devoted to establishing the proposition that such laws treated the races unequally.”); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2087 (2005) (noting that the *Loving* holding contains ambiguity).

⁴⁸ Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1227 (1991).

⁴⁹ Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 653 (2006); see also William N. Eskridge, Jr., Lecture, *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 855–56 (2001) (citing *Loving* for the proposition that a state cannot “bar different-race marriages” because doing so is an “invidious discrimination on the basis of race, which is a highly suspect classification”); Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 948 (2000) (citing *Loving* for the proposition that apparent facial neutrality does not preclude close scrutiny and that states may not treat interracial marriages differently from other marriages without a heavy justification).

⁵⁰ Randall Kennedy, *How Are We Doing With Loving?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 817 (1997); see also Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?* 54 AM. U. L. REV. 1487, 1509 (2005) (noting that *Loving* “held that interracial couples have a constitutional right to marry”). In an interesting (albeit very

race and place no longer have any bearing on the law of marriage between a man of one race and a woman of another.”⁵¹

The notion that race is no longer a permissible basis for the differential treatment of families is also reflected in the work of legal scholars who write on interracial adoption. Historically, many states prohibited interracial adoption by statute, or effectively prohibited it in practice,⁵² but this changed after the civil rights and social justice movements of the 1960s and 1970s.⁵³ Today, scholarly commentary regarding the use of race in the adoption context generally focuses on how *Loving* and the Multiethnic Placement Act (MEPA), as amended in 1996, prohibit the consideration of race in the context of adoption. The MEPA prohibits any agency that receives federal funds from denying to any individual the opportunity to become an adoptive or foster parent based on the race, color, or national origin of the individual or child involved,⁵⁴ and from denying or delaying the placement of a child for adoption into foster care on the basis of the race, color, or national origin of the child or the adoptive or foster parent.⁵⁵ While prior to 1996, MEPA provided that states could consider “the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of the child,” these provisions have since

small) window into the intransigence of the issue of race in marriage, a justice of the peace in Louisiana refused to marry an interracial couple because he was concerned that the children would suffer. See Don Ellzey, *JP Refuses to Marry Couple*, HAMMOND DAILY STAR (Oct. 15, 2009, 11:02 AM), http://www.hammondstar.com/articles/2009/10/15/top_stories/8847.txt.

⁵¹ Peter Wallenstein, *Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Laws in North Carolina, South Carolina, and Virginia, 1860's-1960's*, 32 AKRON L. REV. 557, 557–58 (1999).

⁵² Hasday, *The Canon of Family Law*, *supra* note 13, at 857.

⁵³ See Bartholet, *supra* note 48, at 1176–78 (discussing the obstacles to interracial adoption by law and custom and the subsequent increase in interracial adoptions in part due to the “integrationist ideology” of the civil rights movement); Meyer, *supra* note 13, at 188 (explaining that laws and social norms proscribed interracial adoptions until the civil rights movement sparked interest in adoption across racial lines); Twila L. Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community*, 26 B.C. THIRD WORLD L.J. 25, 28 (2006) (noting a substantial increase in interracial adoptions in the 1960s and early 1970s and citing as a reason “a growing social consciousness about race that emerged from the civil rights movement”).

⁵⁴ Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (originally codified at 42 U.S.C. § 5115a (1994)), *amended by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903–04 (1997) (codified at 42 U.S.C. § 1996b(1)(A) (2006)).

⁵⁵ 42 U.S.C. § 1996b(1)(B) (2006); *see also* 42 U.S.C. § 671(a)(18)(A)–(B) (2006) (listing state plan requirements for federal funding).

been repealed.⁵⁶ Thus, scholars stress that the “MEPA now not only prohibits race matching, but also no longer expressly allows agencies to consider the race, color or national origin of the adoptive parents or child as a factor in the placement decision.”⁵⁷ Similarly, scholars suggest that adoption placements “must be colorblind,”⁵⁸ and that “federal[ly] funded agencies are not allowed to use race at all in making foster care and adoptive placement decisions.”⁵⁹

Scholars also use *Loving* to support the argument that adoption must be colorblind. Hasday observes that “[i]n explaining their opposition to prohibitions on interracial adoption, scholars repeatedly observe that *Loving* has virtually eliminated legal distinctions between families based on racial composition, and that the remaining policies and practices disfavoring interracial adoption are the last vestiges of an old issue.”⁶⁰ Scholars argue that *Loving* “deprived the state of authority over the perpetuation of racial separation by means of its legitimating function over marriage,”⁶¹ and suggest that *Loving* precludes denying adoptions or placement decisions on the basis of race⁶² and established a fundamental right to marry and to form a family regardless of race.⁶³

The notion of forming a family regardless of race was also addressed by the Court in *Palmore v. Sidoti*,⁶⁴ which held that race could not be used as the sole factor in making child custody determinations.⁶⁵ Many commentators have cited *Palmore* as an example of race not being a permissible factor in child custody determinations because the state is

⁵⁶ See Howard M. Metzenbaum Multiethnic Placement Act of 1994, 42 U.S.C. § 5115a (1994), *repealed by* Act of Aug. 20, 1996, Pub. L. No. 104-188, § 1808(d), 110 Stat. 1904; 42 U.S.C. § 1996b (2006). MEPA, as amended, has no effect on the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–03, 1911–23 (2006), which provides that Native American children shall be placed in adoptive homes that “reflect the unique values of Indian culture.” 25 U.S.C. § 1902 (2006).

⁵⁷ Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1457 (2006).

⁵⁸ *Id.*

⁵⁹ Elizabeth Bartholet, Correspondence, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2354 n.19 (1998); see also KAREN SPAR, CONG. RESEARCH SERV., ADOPTION: INTERETHNIC PLACEMENT LEGISLATION IN THE 104TH CONGRESS, at CRS-3 (1996).

⁶⁰ Hasday, *The Canon of Family Law*, *supra* note 13, at 858.

⁶¹ Jane Maslow Cohen, *Race-Based Adoption in a Post-Loving Frame*, 6 B.U. PUB. INT. L.J. 653, 665 (1997).

⁶² Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 55 (1993).

⁶³ Barbara Bennett Woodhouse, *Waiting for Loving: The Child’s Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 297 (2005).

⁶⁴ 466 U.S. 429 (1984).

⁶⁵ *Id.* at 434.

prohibited from “insist[ing] that race count as a factor in the ordering of people’s most private lives.”⁶⁶ In essence, the family law canon would have us believe that the law no longer treats African-American families differently than it does white families. But the canon is wrong; family law dictates very different consequences for African-American families than it does for others. One of the most critical differences is that African-American families do not benefit to the same extent as white families from the autonomous family unit, which holds a hallowed place in the canon of family law.

2. *The Canon’s Autonomous Family Unit*

While family law was once governed by rules that gave black families virtually no control over their family composition, the story now told by legal scholars and legal authorities is that all families are “organic, autonomous legal entit[ies].”⁶⁷ In other words, the story is that all families, including black families, are able to organize themselves as they see fit without the interference of the state.

Courts have certainly shaped the “autonomous family unit” story. In the seminal case of *Prince v. Massachusetts*,⁶⁸ the Supreme Court found that there is a “private realm of family life which the state cannot enter.”⁶⁹ It is

⁶⁶ Bartholet, *supra* note 48, at 1227 (emphasis omitted); see also Chip Chiles, *A Hand to Rock the Cradle: Transracial Adoption, the Multiethnic Placement Act, and a Proposal for the Arkansas General Assembly*, 49 ARK. L. REV. 501, 515–16 (1996) (“*Palmore v. Sidoti* is widely acknowledged as the Court’s most direct statement regarding the use of race in child-placement decisions,” noting that the Court found that the use of race violated the Equal Protection clause); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61 (1994) (noting that *Palmore* enforced a “collective’s constitutional imperative for racial equality”).

⁶⁷ Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 189 (1987).

⁶⁸ 321 U.S. 158 (1944).

⁶⁹ *Id.* at 166. While beyond the scope of this Article, it is interesting to note that the right to family is also protected by a number of international conventions. Often, the right to family and the right to privacy are intertwined, with the ultimate purpose of these instruments being the protection of the family unit, or the protection of the family unit from arbitrary interference. Article 12 of the Universal Declaration of Human Rights provides a good example: “No one shall be subjected to arbitrary interference with his[her] privacy, family, home or correspondence, nor attacks upon his[her] honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Universal Declaration of Human Rights, art. 12, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 73–74 (Dec. 10, 1948). Article 17 of the International Covenant on Civil and Political Rights provides similar privacy-laden worded protection for the family unit. International Covenant on Civil and Political Rights, art. 17(1)–(2), Dec. 16, 1966, 999 U.N.T.S. 171.

this notion of an inviolable family that has given rise to separate but interrelated liberty interests that support the notion of an autonomous family unit that is largely protected from state interference. The Court has, in theory, protected the right to “establish a home and bring up children”⁷⁰ and the “freedom of personal choice in matters of marriage and family life,”⁷¹ and established a liberty interest in maintaining the integrity of a “recognized family unit,” such as a parent-child relationship.⁷²

Similarly, the Court has announced that the family unit has the substantive right to maintain its integrity,⁷³ explaining that it is necessary to “protect[] the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition,”⁷⁴ and that “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”⁷⁵ There does not appear to be a more protected and cherished social institution than the family, as the Supreme Court has told us that the family is our society’s “most fundamental . . . institution.”⁷⁶ The family’s inviolable place in society “stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children.”⁷⁷ Thus, the Court has repeatedly recognized that matters involving family life are private and beyond the reach of undue state interference, ostensibly regardless of a family’s racial composition.⁷⁸

Similarly, legal scholars describe the protected familial sphere as a “fundamental right to form a legally sanctioned family bond and the liberty to be free of undue state interference and discrimination in forging one’s

⁷⁰ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁷¹ *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974); *see also Roe v. Wade*, 410 U.S. 113, 152–53 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925); *Meyer*, 262 U.S. at 399.

⁷² *Lehr v. Robertson*, 463 U.S. 248, 258 (1983). This notion began to surface much earlier, even in the context of the slave family. For example, in 1801 a Virginia court held that “an equal division of slaves, in number or value, is not always possible, and sometimes improper, when it cannot be exactly done without separating infant children from their mothers, which humanity forbids.” *Fitzhugh v. Foote*, 7 Va. (3 Call) 13, 17 (1801).

⁷³ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

⁷⁴ *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

⁷⁵ *Id.* at 503–04.

⁷⁶ *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

⁷⁷ *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (alteration in original) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972)).

⁷⁸ *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990); *Moore*, 431 U.S. at 502–03.

most intimate relationships.”⁷⁹ Legal scholars repeatedly emphasize the law’s default protection of “the integrity of the family,”⁸⁰ that families have the right to be “free of regulation by the state,”⁸¹ and that “no one seriously questions the importance of maintaining the integrity of the nuclear family”⁸² or the “sanctity of marriage and family.”⁸³ Similarly, courts recognize that “[i]n the United States, most rights and responsibilities for raising children rest with the parents, in accordance with the strong value placed on the sanctity of the family.”⁸⁴

The notion that there is a stark line between the family and the state has been particularly noteworthy in the context of dependency, in which family law scholars have argued that the notion of “family autonomy” has resulted in too little intervention in families.⁸⁵ In this context, scholars have argued that “[f]amily autonomy . . . is a pervasive feature of American family law,”⁸⁶ that “a stark line divides the family from the state,”⁸⁷ that “family autonomy serves to protect family integrity,”⁸⁸ that “[a]bsent exigent

⁷⁹ Woodhouse, *supra* note 63, at 300.

⁸⁰ William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL’Y REV. 347, 360 (2006) (“A judge . . . applies the law impartially in a variety of cases in which the law protects the poor, victims of wrongdoing, the integrity of the family, and religious freedom, and the judge respects the law when it does not empower him to prevent a third party from committing an immoral act.”); Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. & POL’Y REV. 63, 70 (2006).

⁸¹ Paul M. Smith, *What the Court Said in Lawrence*, 115 YALE L.J. POCKET PART 129, 129, 131 (2006), <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/constitutional-law/what-the-court-said-in-lawrence/>.

⁸² Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1951 (2000).

⁸³ Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL’Y 411, 450 (2000).

⁸⁴ Gregory A. Horowitz, Note, *Accommodation and Neutrality Under the Establishment Clause: The Foster Care Challenge*, 98 YALE L.J. 617, 619 (1989) (footnote omitted).

⁸⁵ ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 3, 38, 98–110 (1999) (arguing that there is systemic underintervention by the child welfare system due to a general reluctance to intrude on family autonomy); Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 569 (1992) (contending that “[a]ttempts to accommodate family autonomy . . . have significantly compromised the protection of our children”).

⁸⁶ Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1498 (2007).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1499.

circumstances, the state leaves parents alone to make their own decisions regarding child rearing,”⁸⁹ and that family autonomy “safeguards cultural and moral diversity in matters of child rearing, which in turn serves democratic principles.”⁹⁰ In short, the canon of family law would have us believe that the correct way “to interpret American cases dealing with family autonomy issues is to say that courts will, whenever possible, defer to parental authority and preserve the privacy that has come to be expected by families.”⁹¹ Some scholars have indeed resisted the family law canon. For example, Peggy Cooper Davis notes that “[t]he scope of constitutional rights of family autonomy is largely undetermined” and laments that in the case of black families in particular, “[i]n the area of termination of parental rights, courts have not been protective of the family unit.”⁹² But the canon has not yet been subjected to enough sustained and consistent challenge to alter the notion of an autonomous family unit.

II. THE FAMILY LAW CANON DOES NOT ACCURATELY REFLECT THE REGULATION OF AFRICAN-AMERICAN FAMILIES

The notion of an inviolable family and the increased protection for the family sphere has some foundation indeed. But this story of an “autonomous family unit” that is largely protected from the government does not accurately reflect the regulation of black families. It obscures a reality within family law that is not often discussed in legal scholarship, family law casebooks, or jurisprudence: family law’s failure to provide African-Americans the same degree of autonomy to organize or structure their families as it provides to whites. This reality is sadly ironic because of the central place of the stories of former slaves in the passage of the Thirteenth and Fourteenth Amendments.⁹³ As Peggy Cooper Davis found, at that time Congress was “deeply affected by the widely publicized accounts of parental separations and fully responsive to the argument that rights of family are

⁸⁹ *Id.* (footnote omitted). A leading family law casebook states that “the principle of parental autonomy (the freedom to rear children as parents see fit) has long constrained state intrusion into the family.” D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 795 (4th ed. 2010).

⁹⁰ Huntington, *supra* note 86, at 1499 (footnote omitted).

⁹¹ McMullen, *supra* note 85, at 581.

⁹² Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Slavery*, 4 HARV. BLACKLETTER J. 9, 14 (1987).

⁹³ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 234 (2002); Davis & Dudley, *supra* note 92, at 14 (“The thirteenth and fourteenth amendments were conceived by men who regarded the deprivation of family rights as a fundamental vice of slavery and the protection of family rights as an essential component of citizenship.”).

inalienable.”⁹⁴ The stories of family separation and the right of family were central to the Reconstruction Congress and, ironically, contemporary ideas of family autonomy were born out of an effort to eradicate racial oppression.⁹⁵ Yet, today African-Americans do not have the same ability to organize their families as do whites. And a post-racial family law canon does not tell this story.

The most poignant evidence that family law is not colorblind is the fact that the autonomous family unit is less of a reality for African-Americans than it is for whites. Indeed, for many African-Americans, the autonomous family unit is largely a myth. The law’s disproportionate intrusion into African-American family life began with the slave codes and continues today through the application of traditional family law rules, such as the best interest standard, and through other systems—such as the social welfare and child welfare systems—that are not traditionally included in the family law canon, but nonetheless should be, as they affect family autonomy and structure.⁹⁶

A. The Myth of the “Autonomous Family Unit” for African-American Families

The canonical story is that during the time of slavery black families were highly regulated because white masters had the right to compose the slave

⁹⁴ PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 112 (1997); *see* CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. Harlan) (“Another incident [of slavery] is the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family.”); *id.* at 1324 (statement of Sen. Wilson) (“[W]hen [the Thirteenth Amendment] to the Constitution shall be consummated . . . [t]hen the sharp cry of the agonizing hearts of severed families will cease to vex the weary ear of the nation Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom.”).

⁹⁵ ROBERTS, *supra* note 93, at 234; *see* DAVIS, *supra* note 94, at 113 (explaining that during debates on the Thirteenth Amendment, members of the Reconstruction Congress were sensitive to violations of the integrity of slave families and “repeatedly acknowledged the fundamental and inalienable character of rights of family”); Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J.L. & POL’Y 45, 62 (2008) (stating that for some members of the Reconstruction Congress, the Thirteenth Amendment’s eradication of slavery also necessarily included protection for “the basic right of familial integrity”).

⁹⁶ Hasday, *The Canon of Family Law*, *supra* note 13, at 892–98 (discussing the exclusion of welfare law from the family law canon despite welfare law’s regulation of the rights and responsibilities of poor families).

family; but that now, however, the disproportionate regulation of black families is long behind us. According to this story, black families are now able to organize their families on an equal basis with other families. This story is reflected in virtually all of the leading family law textbooks, in which the evolution of the right to privacy in the context of the familial unit is routinely discussed in a race-neutral way, bereft of any historical grounding in the context of slavery.⁹⁷ In fact, there is virtually no discussion of slavery at all in the leading family law casebooks, let alone in the context of a discussion of the evolution of the right to privacy, or the “autonomous family unit,” for African-American families.

Despite our lofty platitudes about being a nation of blind justice and equal opportunity, the American⁹⁸ legal system has singled out blacks for the most “pernicious treatment” of any group for three centuries, possibly aside from Native Americans.⁹⁹ The legacy of slavery is one of the subtexts of this

⁹⁷ While the major family law casebooks discuss the evolution of the right to privacy in the context of the family, none explore explicitly how that evolution might vary based on race. Similarly, while two major family law casebooks briefly mention the lack of protection provided to African-Americans during the time of slavery, and one includes an excerpt from Professor Peggy Davis, no authors make any connection between a past lack of protections of slave families and a current lack of protections for black families. See, e.g., DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 180 (2d ed. 2009) (briefly mentioning in a note that slaves could not legally marry and lacked protected family lives, without further discussing the current lack of protections for African-American families); JUDITH AREEN & MILTON C. REGAN, JR., *FAMILY LAW: CASES AND MATERIALS* (5th ed. 2006); LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, *FAMILY LAW* (4th ed. 2010); HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* (6th ed. 2007); WEISBERG & APPLETON, *supra* note 89, at 18 (citing and excerpting an article by Professor Peggy Davis for her proposition that *Meyer v. Nebraska* and *Pierce v. Society of Sisters* are based on the antislavery impulses of the Fourteenth Amendment and as such recognize and embrace the autonomy of all families in contrast to the restrictions on the ability of African-American parents to raise and impart values to their children during slavery); *id.* at 215–16 (providing an excerpt of John Blassingame’s study of slave life in which he discusses the regulation of slave families, but making no connection to the contemporary failure to protect and preserve African-American families).

⁹⁸ The term American is used in this Article to refer to the United States of America. It is used because this term has achieved almost universal acceptance as a reference to the United States of America. The author pauses to acknowledge that its use is inaccurate because it ignores the fact that there are many other countries in North and South America.

⁹⁹ A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 WASH. U. L.Q. 673, 677 (1989) [hereinafter Higginbotham, *Race, Sex, Education*]; see also DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 19–21 (6th ed. 2008); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 4–5 (1987); MARY FRANCES BERRY & JOHN W. BLASSINGAME, *LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA* 227–60

Article and includes a color consciousness that is as intransigent as it is complex.¹⁰⁰ To begin the discussion of the myth of the “autonomous family

(1982); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 4, 6 (1978) [hereinafter HIGGINBOTHAM, IN THE MATTER OF COLOR]; C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 11 (3d rev. ed. 1974). See generally JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (6th ed. 1988). As a separate but related point that has relevance for this Article as a whole, there can be no progress without knowing and understanding our history. Judge Cardozo makes this point in his classic treatise, *The Nature of the Judicial Process*. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 54 (1921). In his seminal article, *Toward an Equalitarian Legal Order*, Judge William H. Hastie, the first black federal judge who later became Chief Judge of the United States Court of Appeals for the Third Circuit, concluded that a historical perspective is necessary if one is to understand progress in the area of American race relations. William H. Hastie, *Toward an Equalitarian Legal Order, 1930–1950*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 30–31 (1973). Judge Hastie analyzed the period of American history leading up to the civil rights movement and “stressed that the ‘struggle can be viewed in perspective only if the antecedent status of the Negro is comprehended, and such realization is not easy today, particularly for the many millions of Americans who have reached maturity since 1950.’” Higginbotham, *Race, Sex, Education, supra*, at 678 (quoting Hastie, *supra*, at 19).

¹⁰⁰ Both the intransigent and complex natures of our color consciousness were highlighted in the 2008 presidential contest. See, e.g., Bob Herbert, Op-Ed., *Heading Toward the Danger Zone*, N.Y. TIMES, Apr. 26, 2008, at A21 (“However one views the behavior of Bill and Hillary Clinton—and however large the race issue looms in this election, and it looms large—there can be no denying that an awful lot of Mr. Obama’s troubles have come from his side of the table.”); Abigail Thernstrom & Stephan Thernstrom, Op-Ed, *Taking Race Out of the Race*, L.A. TIMES, Mar. 2, 2008, at M5 (“[I]t may be time to rethink some of our most basic assumptions about voters and race.”); Jay Tolson, *Does Obama’s Winning Streak Prove That Race Doesn’t Matter?*, U.S. NEWS & WORLD REP. (Feb. 15, 2008), http://www.usnews.com/articles/news/campaign-2008/2008/02/15/-does-obamas-winning-streak-prove-that-race-doesnt-matter.html?msg=socialweb_1 (“The labels red and blue now define a partisan divide so profound that it seems to have produced two entirely different nations. That divide is itself sustained by a host of other divisions, including those of race”); Senator Barack Obama, *A More Perfect Union* (Mar. 18, 2009) (transcript available at the National Constitution Center), [available at http://www.constitutioncenter.org/amoreperfectunion/](http://www.constitutioncenter.org/amoreperfectunion/) (“Throughout the first year of this campaign, against all predictions to the contrary, we saw how hungry the American people were for this message of unity. Despite the temptation to view my candidacy through a purely racial lens, we won commanding victories in states with some of the whitest populations in the country. In South Carolina, where the Confederate Flag still flies, we built a powerful coalition of African Americans and white Americans. This is not to say that race has not been an issue in the campaign. At various stages in the campaign, some commentators have deemed me either ‘too black’ or ‘not black enough.’ We saw racial tensions bubble to the surface during the week before the South Carolina primary. The press has scoured every exit poll for the latest evidence of racial polarization, not just in terms of white and black, but black and brown as well. . . . [Still,]

unit,” and how this myth underscores an often ignored relationship between family law and racial inequality, this Article first discusses the law regulating the black family during the time of slavery.

It is necessary to start here because it is the neglect of slavery in family law discussions that obscures the impact of its legacy on the country’s collective consciousness, and its impact on the consciousness of individual Americans. We have much to learn from this legacy, which reflects an “autonomous family unit” that is less autonomous for blacks than for whites; like the pre-civil war caste system, reflects both practical and logistical roadblocks to black family formation; asserts the incompetence and inherent unfitness of black parents and, in particular, black mothers; and reflects stories of family separation and the thwarting of attempts for black families to remain together.

1. *The Roots of Regulation: Black Families as Creatures of the State*

From the inception of the slave trade in 1619, the law governing slaves sought to strike a seemingly untenable balance. The law needed to accommodate the notion that slaves were property, while at the same time accommodate the principles of equality and human rights that were to be the bedrock principles of this Nation.¹⁰¹ While England’s common law system provided some guidance in striking this balance, the American legal system, which was still in its infancy, was left to develop its precedents and governing principles largely on its own.¹⁰²

race is an issue that I believe this nation cannot afford to ignore right now. . . . The fact is that the comments that have been made and the issues that have surfaced over the last few weeks reflect the complexities of race in this country that we’ve never really worked through—a part of our union that we have yet to perfect.”).

¹⁰¹ See HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 99, at 58–60 (noting the “exclusion of blacks from any basic concept of human rights under [colonial Virginia] law” even as Virginia statesmen created the noteworthy Virginia Bill of Rights that declared the equality, freedom, and intrinsic rights of all men); A. Leon Higginbotham, Jr. & Greer C. Bosworth, “*Rather than the Free*”: *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 20–21 (1991) (observing that Virginians “enacted repressive legislation to protect their property interests in slaves” despite their leaders’ worries about “the contradiction between their support for the ideals of freedom and equality in the Declaration of Independence and the Constitution and their opposition to those ideals for free blacks and slaves”).

¹⁰² See HIGGINBOTHAM, IN THE MATTER OF COLOR, *supra* note 99, at 19–60 (discussing Virginia’s pioneering role in developing slavery laws that would be emulated by other colonies); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 42–43 (1996) (citing the English common law of property as a source of the colonial law of slavery); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave’s Human Nature in Virginia Civil Law*,

During the nineteenth century, the American legal system developed, and the law specific to the regulation of the family was born.¹⁰³ For the first time, the rights and obligations governing American family life were enshrined in law. For white settlers, the “proper” roles of husband and wife were now reflected in the law, and legal frameworks established rules for entering marriage and divorce.¹⁰⁴ The law that eventually emerged defined “the family” as “an organic, autonomous legal entity,”¹⁰⁵ and this definition is reflected in the writings of legal authorities and scholars to this day.

The newly emerging law governed only the lives of the families who were not slaves. Slave families were not autonomous legal entities.¹⁰⁶ On the contrary, the law governing slaves specified that slaves were subject, first, to the will of their masters and second, to the will of all whites.¹⁰⁷ Despite blood relationships, love, or caregiving formations, slaves could lawfully be sent to another plantation, another town, or another state.¹⁰⁸ Thus, the notion of permanency for slave families was strikingly nonexistent, as slaves were seen as individual items of property rather than husbands, wives, fathers, or otherwise connected to other slaves as a family.¹⁰⁹ The most fundamental and sacred life events—marriage, childbirth, and procreation—were manipulated in the interests of profit for the slave owner.¹¹⁰ While slaves did indeed form families, they did not have the blessing, or the protection, of law.¹¹¹ And while black men and women did have long-term relationships

50 OHIO ST. L.J. 511, 513 (1989) (noting that the common law of property “provided a starting point for the law of slavery [in Virginia]”).

¹⁰³ For a thorough examination of the development of the American legal system in the nineteenth century, see generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985), and for a thorough examination of the development of family law during this time, see generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

¹⁰⁴ Burnham, *supra* note 67, at 189.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* 546 (2d ed. 2001); *see also* GEORGE M. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* 154 (1856).

¹⁰⁸ Burnham, *supra* note 67, at 189.

¹⁰⁹ PETERS, *supra* note 107, at 546 (“[B]ecause they were not considered persons, slaves had no legal rights.”); Burnham, *supra* note 67, at 189.

¹¹⁰ PETERS, *supra* note 107, at 546; Burnham, *supra* note 67, at 189; *see also* FRANKLIN & MOSS, *supra* note 99, at 127–28 (discussing how the institution of slavery subjugated slave families). Jean Koh Peters explains that during this time, “all sexual relations between slaves were left to be regulated by their owners.” PETERS, *supra* note 107, at 546.

¹¹¹ Burnham, *supra* note 67, at 189.

during this time, they were never considered husband and wife under the law; consequently, their children were considered “illegitimate,” having been born to a couple that was not legally recognized as married.¹¹²

The lack of protection for the slave family was reflected throughout the law governing slaves.¹¹³ For example, the law protected the ability of masters to sell their slaves away from their families¹¹⁴ and even permitted the sale into slavery—irrespective of where their family may be—of any *free* blacks who were found without proof that they were free.¹¹⁵ Similarly, the marriage relationship between slaves was completely subject to the whim of the master, as “the right of the owner to separate the parties was a corollary of his property right.”¹¹⁶ While selling married slaves away from one another

¹¹² PETERS, *supra* note 107, at 546.

¹¹³ HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925*, at 9 (1976); PETERS, *supra* note 107, at 546. Jean Koh Peters observes, “Thus as a bottom line, no slave relationships of any kind were ever acknowledged to be legal.” PETERS, *supra* note 107, at 546.

¹¹⁴ In *Justice and Jurisprudence and the Black Lawyer*, J. Clay Smith included a list of abridged selections from the American Slave Code (which he gathered from the abolitionist newspaper *The Anti-Slavery Bugle*) that illustrate masters’ dominion over their slaves. J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, app. at 1105–12 (1994). For example, Smith found that the Louisiana Civil Code provided that, “A Slave is one who is in the power of his master, to whom he belongs. The master may sell him, dispose of his person, his industry and his labor.” *Id.* app. at 1105. Similarly, he found that South Carolina *Brevard’s Digest* provided: “Slaves shall be deemed sold, taken, reputed, and adjudged in law to be *chattels personal* in the hands of their owners, and possessors, and their executors administrators, and assigns, to all intents, constructions and purposes whatever.” *Id.* app. at 1109.

¹¹⁵ For example, Smith found that the Mississippi Revised Code provided that, “Every negro or mulatto found in the State, not able to show himself entitled to freedom, may be sold as a slave,” *id.* app. at 1108; the Georgia *Prince Digest. Act Dec. 19, 1818* provided that, “Penalty for any free person of colour (except regularly articulated seamen) coming into the state, a fine of one hundred dollars, and on failure of payment to be sold as a slave,” *id.*; the North Carolina *Act of 1799* provided that, “Any slave set free, except for meritorious services, to be adjudged of by the county court, may be seized by any free holder, committed to jail, and sold to the highest bidder,” *id.* app. at 1110; the Virginia Revised Code provided, “Any emancipated slave remaining in the state more than a year, may be sold by the overseer of the poor, for the benefit of the *literary fund!*” *id.* app. at 1111; and the Slave Code of the District of Columbia provided that, “Coloured persons residing in the city, who cannot prove their title to freedom, shall be imprisoned as absconding slaves,” *id.* app. at 1112.

¹¹⁶ HARRISON ANTHONY TREXLER, *SLAVERY IN MISSOURI: 1804–1865*, at 87 (1914), in 32 *JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE* 183 (1914).

was widely known to break the marriage bond,¹¹⁷ slaves were routinely separated at their owners' will.¹¹⁸ Thus, as a practical matter, "the pre-Civil War American caste system set up numerous practical and logistical roadblocks to conventional family relations such that slaves could maintain a *de facto* family life only with great difficulty."¹¹⁹

Slave narratives offer a particularly vivid window into the lack of control that slaves had over their relationships. These narratives can be particularly helpful in putting the lives of slaves in a fuller context, and they reveal nuances of slave life that are often not found in case law, as there was no legal remedy for most of the conditions about which slaves would otherwise have sought legal redress.¹²⁰ The narratives reflect both fear of being separated from family, as well as a sense of helplessness from being unable to stop such separation.¹²¹ A former slave from Missouri, Malinda Discus, recalled:

"I remember that my mother used to gather us children around her and pray that we would not be separated. She was separated from her parents when eleven years old and brought to Missouri from Tennessee. She never saw any of her folks again and the last words her mother said to her was: 'Daughter, if I never see you again any more on earth, come to heaven and I will see you there.'"¹²²

Eventually, Malinda's husband was sold.¹²³ After being sold, he was asked to what extent he had been able to see his family. He responded: "Yes Suh, sometimes I did. I seen my brothers and sisters but they had different names. Then I heard my Pappy had died. I don't remember him. My Mammy was sold down South and I never seen her again 'til after the war was

¹¹⁷ In *Slavery in Missouri*, a comprehensive treatise on the rights of slaves in Missouri, Harrison Anthony Trexler highlights the anti-slavery movement's criticism of the right of owners to separate married slaves. *Id.*

¹¹⁸ *Id.*

¹¹⁹ PETERS, *supra* note 107, at 546–47.

¹²⁰ Higginbotham, *Race, Sex, Education*, *supra* note 99, at 688.

¹²¹ *See id.* at 688–89.

¹²² *Id.* (quoting Interview with Malinda Discus (Feb. 1, 1938), in *THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY* 168 (George P. Rawick et al. eds., 1977) [hereinafter *AMERICAN SLAVE*]).

¹²³ *Id.* at 689.

over.”¹²⁴ The stories of family separation and the lack of any protection for slave families are pervasive throughout slave narratives.¹²⁵

The status of family for blacks during slavery was summarized by one family law scholar:

Thus this system of family law can be summarized in painfully simple terms. The law not only did not recognize black families, but it also actively worked to prevent the formation of black families until the Civil War. An entire segment of American society lived in a system of family law that actively thwarted their attempts to live together in conventional family households.¹²⁶

Black families continued to suffer forced separation through the period that is commonly referred to in American history as “Reconstruction” and its backlash.¹²⁷ One of the central aims of Reconstruction was to foster the so-called “new habits of social discipline in the freedmen.”¹²⁸ One of the elements of this strategy was to enact “laws that permitted, or in some states *required*, local officials to remove a child from the home of an African American family when the child’s parents did not have the means to support the child.”¹²⁹ While blacks were no longer subject to the absolute will of their owners during this time, African-Americans often had little control over the composition or structure of their own families, frequently being separated from their children if they were poor.¹³⁰

¹²⁴ *Id.* (quoting Interview with Mark Discus (Feb. 2, 1938), in *AMERICAN SLAVE*, *supra* note 122, at 172).

¹²⁵ *Id.* Another example is that of Charles Johnson of Vernon County, Missouri: “‘Yes Ma’am, I was a born slave. My Master’s name was Caleb Goodlow. My Mistress, Mrs. Goodlow she cared for me and raised me from a little fella.’ ‘Parents?’ he replied. ‘I don’t know nothin’ bout no parents; can’t remember ever seein’ ‘em.’” *Id.* at 689 n.72 (quoting Interview with Charles Johnson (Sept. 8, 1937), in *AMERICAN SLAVE*, *supra* note 122, at 200).

¹²⁶ PETERS, *supra* note 107, at 548; see DAVIS, *supra* note 94, at 30, 90–91 (discussing the prohibition of legally binding marriages during slavery and the disruption of bonds between slave partners and between slave parents and children); ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 122 (2004) (noting that slaves experienced “great obstacles in maintaining stable family relationships”).

¹²⁷ Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541, 1549–50 (2001).

¹²⁸ *Id.* at 1549.

¹²⁹ *Id.* at 1550.

¹³⁰ See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION: 1863–1877*, at 201 (1988) (explaining that the poverty of former slaves was used as justification for seizing black children and binding them out as unpaid laborers to former slaveowners and other white employers); GUTMAN, *supra* note 113, at 402–12 (discussing

While the passage of the Thirteenth and Fourteenth Amendments caused a number of blacks to have their marriages legally recognized,¹³¹ “black codes” attempted to reestablish economic and social control over a black population that, in the not-so-distant past, had been enslaved.¹³² The black codes were comprehensive legal schemes enacted to regulate the freedom of blacks, and they often included provisions that were hostile to black family formation, such as euphemistically titled “apprenticeship laws” that allowed “judges to bind black orphans and poor children[,who were often black,] to white employers.”¹³³ As they have throughout history, blacks fought to maintain family relationships notwithstanding these laws; they were sometimes able to take back their children, and were sometimes able to take their cases to court.¹³⁴ Professor Dorothy Roberts has observed that once, “[t]hree hundred Black citizens sent a petition to President Andrew Johnson charging that ‘[their] homes [were] invaded and [their] little ones seized at the family fireside, and forcibly bound to masters who [were] by law expressly released from any obligation to educate them in secular or religious knowledge.’”¹³⁵

Scholars have also observed the oppressive nature of these laws, recognizing that they were just “a slight extension of anti-bellum [sic] laws requiring all blacks over the age of twelve to have a white guardian.”¹³⁶ While in some states the black codes never ultimately became law, southern courts disproportionately enforced apprenticeship statutes.¹³⁷ The theory behind apprenticeship statutes, at least in part, was that black parents were incompetent because they had not acted as parents during slavery, as the

how black children were forcibly bound out as indentured servants to former slave owners and other whites immediately after emancipation).

¹³¹ PETERS, *supra* note 107, at 548.

¹³² *Id.*; see DAVIS, *supra* note 94, at 114 (stating that the purpose of the black codes was “to perpetuate white control over black labor as well as to maintain, through the Jim Crow system, the civil and social subordination of black people”); KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865–1877*, at 79 (1965) (“[T]he purpose of the Black Codes was to keep the Negro, as long as possible, exactly what he was: a propertyless rural laborer under strict controls, without political rights, and with inferior legal rights.”).

¹³³ PETERS, *supra* note 107, at 548–49; see also FONER, *supra* note 130, at 198–201.

¹³⁴ ROBERTS, *supra* note 93, at 234; see FONER, *supra* note 130, at 201 (discussing the forced apprenticeships of black children and their parents’ efforts to win their release); GUTMAN, *supra* note 113, at 404–12 (discussing the attempts by Maryland blacks to have their children returned to them from compulsory apprenticeships).

¹³⁵ ROBERTS, *supra* note 93, at 234 (quoting GUTMAN, *supra* note 113, at 411).

¹³⁶ PETERS, *supra* note 107, at 549 (internal quotation marks omitted); see also FONER, *supra* note 130, at 201.

¹³⁷ PETERS, *supra* note 107, at 549; see also FONER, *supra* note 130, at 198–201.

master could act in their place and subject their children to discipline.¹³⁸ This theme is reflected in laws governing black families passed during the War on Poverty, as will be discussed below, and continuing until the present day.¹³⁹

2. *The Present-Day Regulation of Black Families*

There are many ways to tell the story of the current regulation of black families. This section begins by telling a story of disproportionate impact on African-American families, showing the impact of the child welfare and welfare systems on black families, in part, by virtue of their disproportionate representation in these systems. Next a story is told of intentional discrimination—both in the passage and implementation of the law—against African-American families. In other words, the law intentionally discriminates against African-American families to the extent that the poor were reconceptualized as undeserving and black.¹⁴⁰ While some scholars, such as Dorothy Roberts, have told these stories, what is particularly important to consider for the purposes of this Article is that these stories are largely absent from the family law canon.

¹³⁸ See MARY FARMER-KAISER, *FREEDWOMEN AND THE FREEDMEN'S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION* 99–102 (2010) (discussing how apprenticeship laws sanctioned the indenture of black children based on the supposed inadequacies of black parents, and especially black mothers); MARY NIALL MITCHELL, *RAISING FREEDOM'S CHILD: BLACK CHILDREN AND VISIONS OF THE FUTURE AFTER SLAVERY* 155, 173 (2008) (describing the “postemancipation paternalism” that justified the indenture of black children due to the perceived unfitness of black parents and, in particular, black mothers).

¹³⁹ ROBERTS, *supra* note 93, at 235; see also Davis & Dudley, *supra* note 92, at 10–15 (using case studies to explore contemporary manifestations of the reliance on ostensibly pre-Fourteenth Amendment cultural, class, and racial blinders by child welfare professionals and the implications for black family life). That the legacy of slavery is still with us has been recognized by political theorist Judith Shklar, who has insightfully recognized how its neglect in historical accounts has obscured the impact of its legacy on this country's collective consciousness, and indeed, on the consciousness of individual Americans. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 22–23 (1991); see also IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 51–52 (2005).

¹⁴⁰ See KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* 184–85 (2001) (citing research showing that states with the most restrictive welfare eligibility requirements were the mostly likely to have disproportionately black welfare populations); Lori Klein, *Doing What's Right: Providing Culturally Competent Reunification Services*, 12 *BERKELEY WOMEN'S L.J.* 20, 29 (1997) (concluding that “[f]amilies of color are treated differently than white families, and to their disadvantage, at every step of the child dependency process”).

While this Article discusses disproportionate impact and discriminatory intent separately for analytical simplicity (and because this is how our courts have bifurcated our conversation about race¹⁴¹), it is important to consider, when reading the first section below, that this is a story about race, as opposed to a story about class per se.¹⁴² While the child welfare and welfare systems disproportionately impact blacks because they are disproportionately poor, these systems are not otherwise racially neutral. Or, put another way, in this first section, the story is one in which these systems infringe on black family formation because they are poor *and* because they are black. In this first section, we can see class and race working together to contribute to a less autonomous family unit for African-American families; the discussion is about African-Americans “not only as an oppressed racial minority in a white society but as poor people in an affluent one.”¹⁴³ The next section of the Article tells a story in which the laws infringe on black families *because* they are black.

a. The Child Welfare System’s Disproportionate Impact on African-American Families

Although child welfare laws are not traditionally thought of as “family law,” they “regulate[] the creation and dissolution of legally recognized family relationships, and/or determine[] the legal rights and responsibilities of family members.”¹⁴⁴ And the child welfare system is one component of

¹⁴¹ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (requiring both proof of discriminatory intent and racially disproportionate impact for showing of equal protection violation by facially neutral state action); *Washington v. Davis*, 426 U.S. 229, 238–39 (1976) (same); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1133–34 (1997) (discussing how the Supreme Court restricted disproportionate impact claims by also requiring a showing of discriminatory intent); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011) (discussing how the Supreme Court’s enunciation of a discriminatory intent requirement has acted as an impediment to disproportionate impact claims).

¹⁴² While there is a story to tell about class, as family law does provide different rules to regulate poor families, this story has been told by others and I need not repeat it here. See Hasday, *The Canon of Family Law*, *supra* note 13, at 832, 892–98 (discussing how the exclusion of welfare law from family law has allowed the disparate treatment of poor families).

¹⁴³ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 38 (2010); see FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 269 (1977).

¹⁴⁴ See Hasday, *The Canon of Family Law*, *supra* note 13, at 871, 893.

family law that regularly intrudes upon African-American families.¹⁴⁵ This system is so prevalent in African-American communities that community activists and religious leaders have analogized it to the institution of slavery and described welfare agencies as “the new slave master.”¹⁴⁶ Dorothy Roberts has found that “[b]lack families are the most likely of any group to be disrupted by child protection authorities,”¹⁴⁷ and statistics from around the country support her conclusion.¹⁴⁸ While black children make up

¹⁴⁵ In *Foster Care Reform in New York City: Justice For All*, Sally K. Christie discusses the disparate impact of the foster care system on African-American children and families. Sally K. Christie, *Foster Care Reform in New York City: Justice For All*, 36 COLUM. J.L. & SOC. PROBS. 1, 12–15 (2002). She also examines the Adoption Assistance and Welfare Act of 1980, the Adoption and Safe Families Act of 1997, and New York City’s efforts to reform its foster care system, and claims that “the devaluation of the black family through excessive state intervention sends a message of inferiority that harms black children and the group as a whole.” *Id.* at 17–18. As an attorney who has represented children in dependency proceedings, and as the son of a social worker who has a life-long dedication to children, I understand the need for intervention in families when children are at risk. But such intervention must take into consideration the destruction that it can cause to viable family systems and the cultural, class, and racial blinders that result in legislation and actions that were designed to and do disproportionately impact African-American families.

¹⁴⁶ ROBERTS, *supra* note 93, at 69 (quoting Rev. Andy Williams, a member of Chicago’s black community). For examples of claims of racial discrimination that have been taken to federal court, see *id.* at 70.

¹⁴⁷ *Id.* at 8. Probably the most striking illustration of this is the extent to which the representation in the dependency system stands in stark contrast even to the representation of other minorities. Roberts observes:

Black children even stand out from other minorities. Latino and Asian American children are *underrepresented* in the national foster care population. Latino children make up only 15 percent of children in foster care although Latino children now outnumber Blacks in the general population. (Under U.S. Bureau of Census standards, children of “Hispanic origin” may be of any race.) Take, for instance, California, a state with a large Latino population. In 1995, 5 percent of all Black children in California were in foster care, compared to less than 1 percent of Latino children. Only 1 percent of children in foster care nationwide are from Asian/Pacific Islander families.

Id. (footnote omitted).

¹⁴⁸ The disproportionate attention that minority children receive at different stages in the child protection process, such as referral, investigation, and service allocation, is borne out by the Third National Incidence Study of Child Abuse and Neglect (NIS-3). ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP’T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAMS., ADMIN. ON CHILD., YOUTH & FAMS., NAT’L CTR. ON CHILD ABUSE & NEGLECT, THIRD NAT’L INCIDENCE STUDY OF CHILD ABUSE & NEGLECT 4-30 (1996), available at <http://www.childwelfare.gov/systemwide/statistics/nis.cfm> [hereinafter NIS-3]; Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L.

approximately fifteen percent of the children in this country, they make up thirty-one percent of the foster care population.¹⁴⁹ In larger cities, the racial imbalance is even more apparent.¹⁵⁰ “The proportion of Black children in out-of-home care in large states such as California, Illinois, New York, and Texas, ranges from three times to more than ten times as high as the proportion of white children.”¹⁵¹ For example, eighty percent of the foster

REV. 21, 45 (2005) (discussing how African-American children make up forty-one percent of the foster care population but only fifteen percent of the total United States child population). As noted in footnote 142, *supra*, I do not discuss the connection between family law and social class in this Article. For a good article on the historical and current connection between the child welfare system and social class, see Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN L. REV. 423 (1983) [hereinafter Garrison, *Why Terminate*].

¹⁴⁹ U.S. DEP’T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAMS., THE AFCARS REPORT: PRELIMINARY FY 2008 ESTIMATES AS OF OCT. 2009 (16), at 2 (2009), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.pdf [hereinafter AFCARS REPORT]; U.S. CENSUS BUREAU, 2008 POPULATION ESTIMATES, http://www.census.gov/popest/archives/2000s/vintage_2008/ (last visited July 16, 2010).

¹⁵⁰ ROBERTS, *supra* note 93, at 8 (“The enormous growth in foster care caseloads in the late 1980s was concentrated primarily in cities, where there are sizable Black communities.”); Ruth McRoy, *Color of Child Welfare Policy: Racial Disparities in Child Welfare Services* 7 (Apr. 29, 2002), available at <http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/mcroys-transcript.pdf> (noting the racial disproportionalities in the foster care populations in large urban areas). But just because the racial imbalance becomes more apparent, due to the larger absolute number of black children, the overrepresentation of blacks is not necessarily greater in large cities than it is in cities in which blacks are a small minority. In fact, researchers have found that the overrepresentation of blacks is greater in cities in which they are small minorities. ROBERTS, *supra* note 93, at 9. Researchers have proposed a “visibility hypothesis” to account for this phenomenon. *Id.* In short, when blacks “stick out more,” or are “more visible,” they are more likely to be overrepresented in the foster care system, just by virtue of being more visible, and also because they may not have in place the kinds of social networks that otherwise might be able to ward off an investigation. *Id.* Thus, scholars have observed that when blacks make up more than fifteen percent of the population, they tend to be placed in foster care at three times the rate of representation in the general population, whereas when they constitute less than two percent of the population, they tend to be placed in foster care at a rate of fifteen times their rate of representation in the general population. *Id.* at 9–10.

¹⁵¹ ROBERTS, *supra* note 93, at 8. In *Poverty, Race, and New Directions in Child Welfare Policy*, Dorothy Roberts explains that in states with large black populations like Illinois and New York, and urban centers like Chicago and New York City, the racial disparity is even greater than that reflected nationwide. Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL’Y 63, 71 (1999). For example, Roberts finds that in 1996, in Chicago almost ninety percent of the children in foster care were black, and in New York only 750 of the 42,000 children in foster care were white. *Id.*

care children in Chicago are black.¹⁵² While black children make up only nineteen percent of the child population in Illinois, they represent more than fifty-nine percent of the children in foster care.¹⁵³ Similarly, in 2009, there were more than 16,000 children in the foster care system in New York City, and only 647 of these children were white.¹⁵⁴ And in San Francisco in 2007, black children made up approximately sixty percent of the children in the foster care system, whereas black children made up only eleven percent of the population.¹⁵⁵

Perhaps most striking is the extent to which the proportion of black families in the dependency system overshadows other minorities. For example, unlike black families, which are vastly and disturbingly overrepresented in the dependency system, Latino and Asian-American families are *underrepresented* in the dependency system.¹⁵⁶ In fact, Latino

¹⁵² Leila Noelliste, *Local Family Bucks Foster Care's Grim Statistics*, CHI. DEFENDER, June 11, 2008, at 4, available at <http://www.chicagodefender.com/article-1062-local-family-bucks-foster-cares-grim-statistics.html>.

¹⁵³ NANCY ROLOCK, UNIV. OF ILL. AT URBANA-CHAMPAIGN, CHILD & FAMILY RESEARCH CTR., DISPROPORTIONALITY IN ILLINOIS CHILD WELFARE 5 (2008), http://www.cfr.illinois.edu/publications/outcomes_monitoring/disproportionality_in_illinois_child_welfare.pdf.

¹⁵⁴ N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., QUARTERLY REPORT OF CHILDREN AND YOUTH IN THE CUSTODY OF NYS LOCAL DEPTS OF SOCIAL SERVICES (LDSS)—QUARTER ENDING 06/30/09, available at <http://www.ocfs.state.ny.us/main/reports/qrcare-2009-06.pdf>. See generally ROBERTS, *supra* note 93. Roberts observes:

About 30 percent of the children who live in New York City are white. Yet white children make up only 3 percent of its foster care caseload. Less than 24 percent in foster care are Latino and the vast majority—73 percent—are African American. Clearly, child welfare authorities consider foster care a last resort when it comes to white families.

Id. at 9. Poor black families are even more highly represented within the child welfare system. *Id.* If you are a poor black child living in Central Harlem, for example, you have a one in ten chance of being in foster care. *Id.* Another way to think about this is “that in every apartment building in Central Harlem, we could expect to find at least one [black] family whose children are in state custody.” *Id.*

¹⁵⁵ *About DCYF (May 15, 2008), A Message from Director Margaret Brodtkin*, SAN FRANCISCO DEP'T OF CHILD., YOUTH & THEIR FAMS., <http://www.dcyf.org/content.aspx?id=2934> (last visited July 16, 2010); *Data: Stats About SF Families*, SAN FRANCISCO DEP'T OF CHILD., YOUTH & THEIR FAMS., <http://www.dcyf.org/Content.aspx?id=982> (last visited July 16, 2010); see also ROBERTS, *supra* note 93, at 9.

¹⁵⁶ ROBERTS, *supra* note 93, at 8 (observing that “Latino and Asian American children are *underrepresented* in the national foster care population”); see also ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND

children make up only twenty percent of the children in foster care despite outnumbering black children in the general population.¹⁵⁷ In 2009, nearly three percent of all black children in California were in foster care, compared with less than one percent of Latino children.¹⁵⁸ And only one percent of children in foster care nationwide are Asian-American.¹⁵⁹ The Third National Incidence Study of Child Abuse and Neglect (NIS-3) also found that blacks receive disproportionate attention at all stages in the child protection process, such as referral, investigation, and service allocation.¹⁶⁰

COUNTY LEVELS 9 (2007), available at <http://www.casey.org/Resources/Publications/pdf/AnalysisOfDisproportionality.pdf> (stating that, given their proportion in the U.S. child population, Latino and Asian-American children have a lower likelihood of being placed in foster care); CTR. FOR JUVENILE JUSTICE REFORM & CHAPIN HALL, RACIAL AND ETHNIC DISPARITY AND DISPROPORTIONALITY IN CHILD WELFARE AND JUVENILE JUSTICE: A COMPENDIUM 13, 44 (2009), available at http://cjjr.georgetown.edu/pdfs/cjjr_ch_final.pdf (stating that Latino children are underrepresented in the foster care system).

¹⁵⁷ AFCARS REPORT, *supra* note 149, at 2; U.S. CENSUS BUREAU, *supra* note 149 (showing that the population of children under the age of eighteen is 73,941,848, and that the population of Hispanic children under the age of eighteen is 16,092,537, or nearly twenty-two percent of the nation's child population). Under U.S. Census Bureau standards, children of "Hispanic origin" may be of any race. ROBERTS, *supra* note 93, at 8 (footnote omitted).

¹⁵⁸ CAROLINE DANIELSON & HELEN LEE, PUB. POLICY INST. OF CAL., FOSTER CARE IN CALIFORNIA: ACHIEVEMENTS AND CHALLENGES 9, 10 tbl. 4 (2010), available at http://www.ppic.org/content/pubs/report/R_510CDR.pdf.

¹⁵⁹ AFCARS REPORT, *supra* note 149, at 2.

¹⁶⁰ NIS-3, *supra* note 148, at 4–30. Additional studies have confirmed this conclusion. See, e.g., Leeann R. Mraovich & Josephine F. Wilson, *Patterns of Child Abuse and Neglect Associated with Chronological Age of Children Living in a Midwestern County*, 23 CHILD ABUSE & NEGLECT 899, 901 (1999); Sara H. Sinal et al., *Is Race or Ethnicity a Predictive Factor in Shaken Baby Syndrome?* 24 CHILD ABUSE & NEGLECT 1241, 1244 (2000) (finding no statistically significant difference in shaken baby syndrome based on race). While the Fourth National Incidence Study of Child Abuse and Neglect (NIS-4) concludes that black children have higher rates of maltreatment than white children, analysts question these conclusions because of faulty methodology, relevant variables that the study does not consider, and issues of poverty that skew the results. See, e.g., ANDREA J. SEDLAK ET AL., U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAMS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS, at 9, 4-22 to 4-30 (2010) [hereinafter NIS-4]; ANDREA J. SEDLAK ET AL., U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAMS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): SUPPLEMENTARY ANALYSES OF RACE DIFFERENCES IN CHILD MALTREATMENT RATES IN THE NIS-4, at 4 (2010) [hereinafter NIS-4 SUPPLEMENTARY ANALYSES OF RACE DIFFERENCES].

With regard to methodology, the definition of "emotional neglect" is broad and vague, and it keeps expanding. See Rich Daly, *What's Behind Soaring Numbers of 'Emotional Neglect' Cases?*, 45 PSYCHIATRIC NEWS 8 (2010), available at

<http://pn.psychiatryonline.org/content/45/7/8.1.full>; NAT'L COALITION FOR CHILD PROTECTION REFORM, CHILD ABUSE IS WAY DOWN (DON'T TELL ANYONE): AN ANALYSIS OF NIS-4 FROM THE NATIONAL COALITION FOR CHILD PROTECTION REFORM 3 (2010), available at <http://www.nccpr.org/reports/NIS4.pdf> [hereinafter NCCPR]. For example, the definition of emotional neglect under the NIS-4 includes new forms of maltreatment not included in the NIS-3 definition, such as "inadequate structure" and "exposure to maladaptive behaviors and environments." NIS-4, *supra*, at 3-9; NIS-3, *supra* note 148, at 2-12, 2-19. Similarly, under the NIS-4 maltreatment definition, "overprotective treatment" and "inappropriately advanced expectations" are standalone forms of maltreatment, whereas under the NIS-3 definition they are merely listed as examples of maltreatment under the miscellaneous category of "other emotional neglect/other inattention to developmental/emotional needs." NIS-4, *supra*, at 3-9; NIS-3, *supra* note 148, at 2-19. The two new forms of maltreatment are another example of vague classifications that are vulnerable to racial bias that can influence the sort of judgment calls needed to interpret the classifications. Also, whereas the NIS-3 defines/explains each form of maltreatment constituting the "emotional neglect" category (and other neglect categories), the NIS-4 does not unpack the meaning of any of the forms of maltreatment making up emotional neglect, leaving more discretion to survey workers who may not have the appropriate mental health training to recognize true emotional neglect and are not asked whether the suspected neglect is necessarily a consequence of parental behavior. NIS-4, *supra*, at 3-9; NIS-3, *supra* note 148, at 2-19; Daly, *supra*. Given the expanding definition of emotional neglect, especially considering that studies show that black children are more likely than white children to be reported for suspected child abuse, these increasing findings should be questioned. Yuhwa Eva Lu et al., *Race, Ethnicity, and Case Outcomes in Child Protective Services*, 26 CHILDREN & YOUTH SERVS. REV. 447, 457 (2004) (finding black children are more likely than white children to be reported for suspected child abuse).

The second reason to question the NIS-4's findings is that the NIS-4 coincides with the economic recession that hit black families the hardest. See NCCPR, *supra*, at 7; NIS-4 SUPPLEMENTARY ANALYSES ON RACE DIFFERENCES, *supra*, at 11. This is particularly salient as there is a real danger of the confluences of circumstances related to poverty with per se neglect, given the NIS-4 newly expanded definition of neglect, which includes for the first time, "inadequate structure" and "exposure to maladaptive behaviors and environments."

And, third, the maltreatment with which the NIS-4 deals is mostly neglect related to poverty; the issue is not that black families have higher rates of abuse, neglect, and maltreatment, but rather that the system deals with these poverty-related problems in an especially punitive way.

There are a few additional things to note about the NIS-4. While the NIS-4 reported that black children had higher rates of maltreatment than white children under both the Harm Standard and Endangerment Standard, see NIS-4, *supra*, at 4-22, 4-27, the racial difference actually reflects smaller decreases in reported maltreatment for black children than the decrease in reported maltreatment of white children. Under the Harm Standard, the rate of physical abuse declined 38% for white children while it declined 15% for black children. *Id.* at 4-25. Under the Endangerment Standard, rates for physical abuse declined 46% for white children and 15% for black children. *Id.* at 4-29. The incidence rate for black children likely decreased less because black children are more likely than white children to be reported as physically abused. See Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 J. AM. MED.

These wildly disproportionate numbers have led some scholars who have extensively studied the child welfare system to conclude that "Black children . . . are separated from their parents with relative ease."¹⁶¹ What these statistics also indicate is that African-American parents lack control over the composition of their own families. A national study of the delivery of child protective services includes a number of particularly sobering findings along

ASS'N 1603, 1603 (2002) (finding that physicians are more likely to report black children with fractures to child protective services as suspected abuse victims even after controlling for likelihood of abuse).

It is also important to note that despite reporting a finding of "strong and pervasive" racial differences in the NIS-4, the authors state in the study's supplementary analyses that "the NIS-4 detected no statistically reliable race-related changes since the NIS-3 in rates of all maltreatment, all neglect, physical neglect or educational neglect, under both definitional standards." NIS-4 SUPPLEMENTARY ANALYSES ON RACE DIFFERENCES, *supra*, at 7; see NIS-4, *supra*, at 9.

¹⁶¹ ROBERTS, *supra* note 93, at 9. Scholars also cite bias and stereotypes as explanations for the disproportionality. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System: [An Essay]*, 48 S.C. L. REV. 577, 587 (1997) ("[T]he state clearly, and at times explicitly, targets women based on their gender, race and class; and unless these women conform to dominant gendered expectations, the state will not release their children."); Sally K. Christie, *Foster Care Reform in New York City: Justice For All*, 36 COLUM. J.L. & SOC. PROBS. 1, 14-15 (2002) (noting that the foster care system does not value African-American families and that "many agencies and the individuals that monitor these [African-American] families see them as pathological, incompetent, and less worthy of preservation"); Fitzgerald, *supra* note 66, at 62 (noting that abuse and neglect statutes are often so vague that they permit "race, class, and cultural bias upon judicial interpretation"); Beth A. Mandel, Comment and Casenote, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence* in *Nicholson v. Williams*, 73 U. CIN. L. REV. 1131, 1132 (2005) (discussing the Court's failure to address race in its decision in the foster care reform case of *Nicholson v. Williams* and suggesting that this failure evidences the way in which courts attempt to deny that racial biases and distinctions play any part in child welfare determinations); Working Group Report, *State Intervention in the Family: Child Protective Proceedings and Termination of Parental Rights*, 40 COLUM. J.L. & SOC. PROBS. 485, 491 (2007) (noting the role of stereotypes in the disproportionate presence of African-Americans in the child welfare system). It is also worth noting the difference in approach in the divorce and foster care literature with respect to family integrity. While in the divorce literature, a child's relationship with her noncustodial parent is generally seen as a positive factor, and efforts are made to facilitate and encourage this relationship, in the context of dependency, the relationship between a child and her biological parent is generally seen as a threat to permanency; termination of parental rights is generally encouraged if the child's return to her biological parent cannot be accomplished quickly. See, e.g., Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 374 (1996) [hereinafter Garrison, *Parents' Rights*]. This distinction is somewhat quizzical, as from the child's perspective there may often be little difference between the two: in both cases the child has a parent or parental figure to whom she is "likely to be deeply attached." *Id.* at 379.

these lines, including the fact that even when African-American children have exactly the same relevant problems as white children, they are more likely to be separated from their families.¹⁶² In relevant part, the report noted the following:

African-American and Hispanic children are still more likely to be placed in foster care than white children when their caretakers are employed; the family is not on AFDC; neighborhood crime and drug problems are absent; families live in small counties; households have fewer than three problems; children have no disabilities, physical or mental health problems; and caretakers do not have a substance abuse problem.¹⁶³

The report concluded that, “[c]ontrolling for each of these situations, African-American children are still more likely to be placed in foster care than white children.”¹⁶⁴

Scholars have offered two reasons to explain why the child welfare system disproportionately impacts African-American families: African-Americans are disproportionately poor,¹⁶⁵ and racism continues to permeate

¹⁶² U.S. DEP’T HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, NATIONAL STUDY OF PROTECTIVE, PREVENTIVE AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES, EXECUTIVE SUMMARY (1997), available at <http://www.acf.hhs.gov/programs/cb/pubs/97natstudy/execsum.htm> [hereinafter NSPPRS]; see ROBERTS, *supra* note 93, at 17; Mark E. Courtney et al., *Race and Child Welfare Services: Past Research and Future Directions*, 75 CHILD WELFARE 99, 125 (1996) (finding that black children and families “experience poorer outcomes and are provided fewer services” than white children and families in the child welfare system); Lu et al., *supra* note 160, at 457 (finding that black children are the most likely to be removed from their homes and least likely to be reunited with their families).

¹⁶³ NSPPRS, *supra* note 162.

¹⁶⁴ *Id.*; see Robert B. Hill, *The Role of Race in Foster Care Placements*, in RACE MATTERS IN CHILD WELFARE: THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM 187, 197 (Dennette M. Derezotes et al. eds., 2005) (reanalyzing the NSPPRS data and finding that black children still were more likely than white children to be placed in foster care even after controlling for variables such as abuse allegation, child disability, caregiver substance abuse problems, and Medicaid benefits); Lu et al., *supra* note 160, at 454–56 (finding that black children were much more likely than white children to be placed in foster care in San Diego even after controlling for gender, age, and reason for referral); Barbara Needell et al., *Black Children and Foster Care Placement in California*, 25 CHILDREN & YOUTH SERVS. REV. 393, 393 (2003) (finding that black children were more likely than white children to be placed in foster care in California even after controlling for factors such as age, reason for maltreatment, and neighborhood poverty).

¹⁶⁵ For an analysis of the historical and current connection between the child welfare system and social class, see Garrison, *Why Terminate*, *supra* note 148.

the system.¹⁶⁶ It stands to reason that because the child welfare system was historically designed to address the needs and the problems of poor families,¹⁶⁷ and because black families are disproportionately represented among the nation's poor,¹⁶⁸ it would be reasonable to expect that African-American families are similarly disproportionately represented in the child welfare system.¹⁶⁹ It is not surprising, therefore, that the dominant explanation of the disproportionate overrepresentation of black children in the child welfare system is one rooted in poverty.¹⁷⁰ This explanation that is tethered in poverty also makes some sense given the child welfare system's historical roots in the philosophy of "child saving" that involved saving

¹⁶⁶ See Banks, *supra* note 1, at 42.

¹⁶⁷ See Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, in A CENTURY OF JUVENILE JUSTICE 3, 6–7, 10, 21 (Margaret K. Rosenheim et al. eds., 2002) (tracing the development of the child welfare system to English and colonial poor laws); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 702 (1998) ("Britain's Elizabethan Poor Law, which separated the children of the poor from their families, served as a model for early child welfare programs in this country." (footnote omitted)).

¹⁶⁸ Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 765 (2001).

¹⁶⁹ ROBERTS, *supra* note 93, at 44; see CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 13 (2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf> (showing that in 2008, the poverty rate for blacks was 24.7 percent while the poverty rate for whites was 8.6 percent); Charlow, *supra* note 168, at 765 ("Given the over-representation of minorities living in poverty, it is not surprising that a disproportionate number of minorities are charged with child maltreatment."); Andrea J. Sedlak & Dana Schultz, *Race Differences in Risk of Maltreatment in the General Child Population*, in RACE MATTERS IN CHILD WELFARE: THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM, *supra* note 164, at 48 (noting that given that "families of color are more likely to have low incomes, then one would expect children of color to be at a higher risk of abuse and neglect").

¹⁷⁰ ROBERTS, *supra* note 93, at 26; see U.S. GOV'T ACCOUNTABILITY OFFICE, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 17–18 (2007), available at <http://www.gao.gov/new.items/d07816.pdf> (reporting that in a survey of U.S. states, poverty was the most commonly cited factor to explain the overrepresentation of black children in the child welfare system); see also Naomi Cahn, *Race, Poverty, History, Adoption, and Child Abuse: Connections*, 36 LAW & SOC'Y REV. 461, 462 (2002) (reviewing DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002)) (arguing that "[c]lass, rather than race, still seems . . . to be one of the dominant motivations for exposing children to the child welfare system"); Charlow, *supra* note 168, at 775 (attributing the overrepresentation of black children in the child welfare system to poverty).

children from the ills of poverty,¹⁷¹ including the so-called “orphan trains” in the late nineteenth and early twentieth century.¹⁷²

Nonetheless, while one might suspect that poverty is sufficient to explain the disproportionate representation of African-Americans in the system, “the overwhelming weight of the evidence indicates that racial bias is at work.”¹⁷³ Further evidence of this racial bias is that even when controlling for income by considering black and Latino households that earn less than \$15,000, which is the income level that correlates most highly with maltreatment and an income level at which blacks and Latinos are similarly represented, Latino children are still considerably less likely to be involved in the child welfare system.¹⁷⁴

Given the disproportionate representation of African-Americans in the child welfare system, laws that govern this system disproportionately affect African-Americans. One child welfare law that has restricted African-Americans’ choice over the structure and composition of their families is the

¹⁷¹ ROBERTS, *supra* note 93, at 26; *see also* Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 899 (1975) (“For the poor, state intervention between parent and child was not only permitted but encouraged in order to effectuate a number of public policies, ranging from the provision of relief at minimum cost to the prevention of future crime. For all others, the state would separate children from parents only in the most extreme circumstances, and then only when private parties initiated court action.”); Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 453 (2002) (noting that “child saving” is the basis of the child welfare system); Grossberg, *supra* note 167, at 22–27 (describing the development of the child saving movement in the late nineteenth century).

¹⁷² *See generally* MARILYN IRVIN HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA* (1992); I–IV ORPHAN TRAIN HERITAGE SOC’Y OF AM., *ORPHAN TRAIN RIDERS: THEIR OWN STORIES* (Kay B. Hall & Mary Ellen Johnson eds., 1992, 1993); EILEEN SIMPSON, *ORPHANS: REAL AND IMAGINARY* (1987).

¹⁷³ ROBERTS, *supra* note 93, at 48–49, 51–53 (documenting racial bias at every step in the child protection system); *see* Ruth McRoy, *The Color of Child Welfare*, in *THE COLOR OF SOCIAL POLICY* 37, 48–57 (King E. Davis & Tricia B. Bent-Goodley eds., 2004) (discussing racial inequities in the child welfare system that have led to the disproportionate representation of black children); Robert B. Hill, *Institutional Racism in Child Welfare*, 7 RACE AND SOC’Y 17, 20 (2004) (highlighting how “structural discrimination” in the historical development and contemporary operation of the child welfare system has led to the overrepresentation of black children in the system).

¹⁷⁴ ROBERTS, *supra* note 93, at 48; *see* Ann F. Garland et al., *Minority Populations in the Child Welfare System: The Visibility Hypothesis Reexamined*, 68 AM. J. ORTHOPSYCHIATRY 142, 146 (1998) (finding that although a near equal proportion of blacks and Latinos live below the poverty level in San Diego County, black children are much more likely to be involved in the child welfare system).

Adoption and Safe Families Act (ASFA).¹⁷⁵ This law makes it easier to terminate parental rights in the dependency system. Moreover, ASFA weakens the requirement that child services agencies make “reasonable efforts” to reunify families by providing exceptions to the requirement of providing such efforts,¹⁷⁶ speeding up the time frame for the termination of parental rights, and providing states financial incentives to terminate parental rights in the process of freeing children for adoption.¹⁷⁷ ASFA operates in this manner notwithstanding the reality that children in foster care, who are overwhelmingly African-American, often languish for years without ever being adopted.¹⁷⁸ Moreover, as the norm for child welfare service agencies is

¹⁷⁵ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

¹⁷⁶ ROBERTS, *supra* note 93, at 108–09; Will L. Crossley, *Defining Reasonable Efforts: Demystifying The State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 293–94 (2003); *Unified Family Courts and the Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2116 (2003).

¹⁷⁷ ROBERTS, *supra* note 93, at 109–11. The rush to terminate parental rights in the context of dependency proceedings is a trend that seems to conflict with a general emphasis by children’s advocates on protecting the relationship between parents and children. Garrison suggests that the case of foster children is unique “because, in contrast to the general emphasis on relationship protection that has characterized advocacy on behalf of children, advocates have here argued in favor of faster and easier termination of the parent-child relationship.” Garrison, *Parents’ Rights*, *supra* note 161, at 373; see David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 143 (1992) (arguing that the effect of delaying permanency for children by attempting to reunite foster children with their natural parents punishes children); George H. Russ, *Through the Eyes of a Child, “Gregory K.”: A Child’s Right to Be Heard*, 27 FAM. L.Q. 365, 384–85 (1993) (arguing that it would be in the child’s best interest to have a lower standard of proof when a termination proceeding is brought by the child). On the other hand, some have argued that faster and easier termination proceedings are not necessarily in a child’s best interests. See, e.g., Garrison, *Why Terminate*, *supra* note 148, at 447, 449–51 (surveying model acts that would ease the process of the termination of parental rights).

¹⁷⁸ Scholars have consistently found that once in foster care, black children are less likely to be reunited with their families than are white or Latino children, and are also less likely to be adopted. See Richard P. Barth, *Effects of Age and Race on the Odds of Adoption Versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285, 288 (1997); S. Finch et al., *Factors Associated with the Discharge of Children from Foster Care*, 22 SOC. WORK RES. & ABSTRACTS 10, 10–18 (1986), cited in Barth, *supra*, at 286. Notwithstanding what might seem like an intuitive conclusion that once parental rights are terminated a child will then be adopted, Marsha Garrison observes, “since termination does not guarantee placement in a permanent home, looser termination standards alone cannot ensure that children will escape the limbo status of foster care.” Garrison, *Why Terminate*, *supra* note 148, at 425. Garrison also observes that “[o]nce a child enters foster care, he has about a 50% chance of remaining there for at least two

to provide inadequate family preservation and reunification services,¹⁷⁹ so-called “concurrent permanency planning,” in which children are placed simultaneously on an adoption track and a reunification track very early in the proceedings, is likely to serve as a “‘fast track’ to adoption” of black children.¹⁸⁰ As two well-known family law scholars have found, “[t]here is currently too much state disruption and supervision of poor minority families. Any innovations in the family court system, then, should [instead] be aimed at minimizing coercive intervention in families and at family preservation.”¹⁸¹

years; the longer he remains in care, the more likely he is to lose contact with his natural parents and to change foster homes.” *Id.* at 426 (citations omitted); *see also* AFCARS REPORT, *supra* note 149, at 1 (the average length of stay for children in foster care in 2008 was approximately twenty-seven months); N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., *supra* note 154 (indicating that the median length of stay in foster care in New York City was approximately two years in 2009); CHILDREN’S DEFENSE FUND & CTR. FOR LAW & SOC. POLICY, CHILD WELFARE IN ILLINOIS 1 (2010), *available at* <http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/cwf/2010/child-welfare-financing-illinois-2010.pdf> (indicating that the average length of foster care stay in Illinois in 2009 was approximately forty-nine months); DANIELSON & LEE, *supra* note 158, at 9 (stating that the average length of foster care stay for black children in California in 2007 was approximately two years).

¹⁷⁹ *See* SHIRLEY BETTER, INSTITUTIONAL RACISM: A PRIMER ON THEORY AND STRATEGIES FOR SOCIAL CHANGE 103–04 (2d ed. 2008) (discussing how negative financial incentives undermine the child welfare system’s obligation to strengthen and preserve families); McRoy, *supra* note 173, at 43 (explaining that the foster care population has increased in part because family preservation services are supported by limited funding while foster care and adoption assistance programs are more generously supported).

¹⁸⁰ ROBERTS, *supra* note 93, at 111, 149.

¹⁸¹ Brooks & Roberts, *supra* note 171, at 455. In *Social Justice and Family Court Reform*, Brooks and Roberts emphasize that they do not completely oppose government intervention, but rather, that the goal should be to support families, and to intervene on a voluntary, noncoercive basis. *Id.*; *see also* Donald N. Duquette, *Looking Ahead: A Personal Vision of the Future of Child Welfare Law*, 41 U. MICH. J.L. REFORM 317, 333 (2007) (contending that “[t]he best way to improve the child protection legal system . . . is to strengthen the general social support for families, [thereby] protecting more children by voluntary, non-coercive means and diverting large numbers of children who today would enter the child welfare system”); Deborah Paruch, *The Orphaning of Underprivileged Children: America’s Failed Child Welfare Law & Policy*, 8 J.L. & FAM. STUD. 119, 164 (2006) (arguing that “[i]ntervention should be authorized only to protect children from very specific harms” and that federal and state funding should be reallocated to preventative services supporting family preservation); Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 36 (2005) (suggesting that child welfare policymakers develop “community-building alternatives to the current reliance on coercive interventions and foster care that are less costly both in monetary and human terms, but that protect children as well”); Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U.

The current state of the child welfare system leads to the inexorable conclusion that the families of children who enter the child welfare system are not typically strengthened, and, in contrast, the bonds of children with their families are frequently broken.¹⁸² While the canon's notion of the autonomous family unit suggests that the family unit is practically inviolate for all, the lack of relative control that African-Americans have over their families is eerily reminiscent of the slave codes and Reconstruction, when African-American families had little control over their own composition.

Yet the family law canon fails to reflect this reality. For example, family law casebooks rarely cover the child welfare system, and if they do, they relegate the topic to a few pages, often in the back of the book. Furthermore, the relatively limited discussion that exists on the child welfare system fails to adequately address racial disparities that permeate the system.¹⁸³ For

J.L. & POL'Y 11, 18 (2009) (arguing that coercive intervention should be "a last resort" in the effort to assist the disproportionately poor and minority families in family court).

¹⁸² ROBERTS, *supra* note 93, at 17; see BETTER, *supra* note 179, at 103–04 (arguing that federal subsidies for the child welfare system provide a perverse financial incentive to remove children from their homes instead of strengthening and preserving families); McRoy, *supra* note 173, at 43 (stating that one reason for the growth of the foster care population is that preventive services are supported by fixed funding, while "[r]eimbursement to states for foster care payments and adoption-assistance programs are open-ended and dependent on the number of children placed in out-of-home care and the cost of their care").

¹⁸³ See, e.g., ABRAMS ET AL., *supra* note 97, at 369–74; AREEN & REGAN, *supra* note 97, at 1189–1303; HARRIS, CARBONE & TEITELBAUM, *supra* note 97, at 991, 1003–04, 1008–12; KRAUSE ET AL., *supra* note 97, at 53–60, 488–524; WEISBERG & APPLETON, *supra* note 89, at 809–918. Specialized texts for courses on children in the legal system discuss racial disparities in the dependency system more so than traditional family law textbooks. The segregation of these discussions in *Child, Parent and State* and *Children and the Law* textbooks underscores the strength and intractability of the family law canon. And even these specialized texts fail to convey the extent of racial bias in the child welfare system. See, e.g., DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 414–26 (3d ed. 2007) (mostly limiting discussion of racial bias to a brief note about racial disparities in the context of reporting on female substance abusers); SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS 504–693, 694–741 (4th ed. 2009) (discussing child welfare in chapters on child protection and foster care, respectively, but with no discussion of race); LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 691–92, 698–702 (2d ed. 2006) (limiting discussion of racial bias in the child welfare system to an excerpt of an article in which the author states that race exacerbates the vulnerability of mothers in the child welfare system, and an excerpt of a Dorothy Roberts article discussing the negative impact of the ASFA on black children and families); ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 264, 355–59 (6th ed. 2009) (limiting discussion of racial bias in the child welfare system to a brief mention of

example, in *Family Law*, by Harris, Carbone, and Teitelbaum, child welfare is only briefly addressed in the back of the book, and the book notes only that children of color are “disproportionately represented in the foster care system and less likely to be adopted,” without any examination of the reasons for the overrepresentation.¹⁸⁴ Similarly, in *Contemporary Family Law*, by Abrams, Cahn, Ross, and Meyer, there are only six pages in the entire casebook devoted to child welfare, with no discussion of race at all.¹⁸⁵ In *Family Law: Cases and Materials*, by Areen and Regan, child welfare is relegated to the second to last chapter of the book (so it is less likely to be covered), and there is no discussion of the racial disparities that permeate the system save a reference to “cultural bias” on one page.¹⁸⁶ And in *Family Law: Cases, Comments, and Questions*, by Krause, Elrod, Garrison, and Oldham, the discussion of race is limited to one problem that notes the racial disparities in the reporting of prenatal drug and alcohol use in one Florida county.¹⁸⁷

Instead of engaging in a thorough discussion of the impact of the child welfare system’s impact on African-American families, family law casebooks focus on foster care in the context of adoption—such as the Indian Child Welfare Act (ICWA) and interracial adoption—and frame racial issues around the pros and cons of interracial adoption.¹⁸⁸ For example, in

criticisms that child abuse procedures are racially discriminatory, and an excerpt of a Dorothy Roberts’ article discussing the adverse impact of the ASFA on black families).

¹⁸⁴ HARRIS, CARBONE & TEITELBAUM, *supra* note 97, at 991, 1003–04, 1008–12 (briefly addressing child welfare in the back of the book in discussing foster care as a source of adoptive homes for special-needs children).

¹⁸⁵ See ABRAMS ET AL., *supra* note 97, at 369–74.

¹⁸⁶ AREEN & REGAN, *supra* note 97, at 1189, 1189–1303.

¹⁸⁷ KRAUSE ET AL., *supra* note 97, at 509; *see id.* at 53–60, 488–524 (relegating main discussion of child welfare to the last section of the chapter on the rights and obligations of children, parents, and the state).

¹⁸⁸ See, e.g., ABRAMS ET AL., *supra* note 97, at 1099–1103; AREEN & REGAN, *supra* note 97, at 1359–76; HARRIS, CARBONE & TEITELBAUM, *supra* note 97, at 992–1011 (discussing the ICWA, a National Association of Black Social Workers (NABSW) position paper, and presenting scholars on both sides of the interracial adoption debate); KRAUSE ET AL., *supra* note 97, at 361–64. Notably, even when an article discussing the impact of the child welfare system on black families is excerpted in a section on adoption, its curious location in this section (as opposed to the section on child welfare) reflects a family law canon that obscures the connection between child welfare and race. See, e.g., ABRAMS ET AL., *supra* note 97, at 1100 (discussing the opposing sides of the interracial adoption debate by juxtaposing Ruth-Arlene W. Howe’s article, classifying interracial adoption as cultural genocide, with Randall Kennedy’s article advocating against race-matching); KRAUSE ET AL., *supra* note 97, at 363 (discussing criticisms of interracial adoption with Cynthia G. Hawkins-Leon’s article discussing the applicability of the ICWA to the African-American community and the disproportionate impact of the foster care system on black children and families as “a form of cultural genocide” (citation omitted)); WEISBERG & APPLETON, *supra* note 89, at 960–62 (discussing the role

Contemporary Family Law, the discussion of race takes place in the context of foster care and is limited to a discussion of the pros and cons of transracial adoption.¹⁸⁹ In *Family Law: Cases and Materials*, the discussion of race in the foster care system is discussed in the context of what should be included in the standard for determining a child's best interest in the context of adoption,¹⁹⁰ and in *Family Law: Cases, Comments and Questions*, the discussion of race in the foster care system takes place in the context of a discussion of the support for and opposition to race-matching in adoption, including a discussion of the ICWA and critical perspectives on interracial adoption.¹⁹¹ In short, the family law casebooks are part of the family law canon that fails to accurately and adequately describe the relationship between family law and race.¹⁹²

b. Welfare Law's Disproportionate Impact on African-American Families

Welfare laws comprise another legal scheme that affects the ability of people who live in poverty to control the composition of their own families. But welfare law is not part of the family law canon.¹⁹³ Furthermore, since African-American families disproportionately comprise the number of impoverished families in the United States, welfare law disproportionately impacts African-Americans.¹⁹⁴ Here, again, is an example of race and

that race should play in choosing an adoptive family with an excerpt from Dorothy Roberts's book discussing interracial adoption and the impact of the child welfare system on black families placed in the section on adoption).

¹⁸⁹ See ABRAMS ET AL., *supra* note 97, at 1099–1103 (including a discussion of the ICWA, a NABSW position paper, and presenting scholars on both sides of the interracial adoption debate).

¹⁹⁰ See AREEN & REGAN, *supra* note 97, at 1359–76 (including a discussion of the ICWA and Twila Perry's article on transracial adoption).

¹⁹¹ See KRAUSE ET AL., *supra* note 97, at 361–64.

¹⁹² Although textbooks include some discussion of race and family law, *see supra* notes 97, 183–84, 186–91, the coverage of race in the context of adoption hardly makes a dent in the extensive relationship between race and family law that is not accurately or adequately covered by the canon. This coverage does not change the inexorable conclusion to be drawn from the currently constructed canon of family law—race has been eliminated as a significant factor in the ordering and operation of U.S. society.

¹⁹³ Hasday, *The Canon of Family Law*, *supra* note 13, at 832, 893–98.

¹⁹⁴ For example, recent statistics show that although blacks make up 12.9% of the population, they make up 36% of the welfare population. *USA QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Aug. 16, 2010); U.S. DEP'T HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM (TANF): EIGHTH ANNUAL REPORT TO CONGRESS, at x (2009), available at <http://www.acf.hhs.gov/programs/ofa/data->

poverty working together. Blacks are disproportionately subject to laws that govern the poor,¹⁹⁵ and these laws are designed and implemented (in part) to regulate misguided and discriminatory notions of black families.

In his dissent in *Bowen v. Gilliard*, Justice Brennan recognized welfare law's impact on African-American families.¹⁹⁶ In *Bowen*, the Court was faced with a challenge to a federal statutory scheme that required that a family's eligibility for welfare benefits take into account the income of all parents and siblings living in the same home, including child support payments.¹⁹⁷ As a result of this statutory scheme, a child who chose to live with his mother would be forced to relinquish his father's child support payment.¹⁹⁸ In other words, this scheme, which the majority opinion upheld as constitutional, involved a "direct and substantial"¹⁹⁹ intrusion into the

reports/annualreport8/TANF_8th_Report_111908.pdf (reporting that African-Americans constitute 36% of the families receiving welfare benefits). Although African-Americans are overrepresented in absolute numbers, they make up a minority of the welfare population. This fact is important to remember to avoid welfare debates falling victim to racist assumptions. Professor Angela Onwuachi-Willig explains that such debates can become about race (when they truly are not): "Racist assumptions have turned public opinion and policy against providing the American poor with welfare benefits as the image of its primary beneficiaries changed from deserving, chaste white widows to lazy, never-married black baby-makers." Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1664 (2005); see also Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. ON POVERTY L. & POL'Y 389, 392 (2004) (noting that inner-city African-American families have never exceeded 20% of the welfare population); Ruth McRoy, *Expedited Permanency: Implications for African-American Children and Families*, 12 VA. J. SOC. POL'Y & L. 475, 478 (2005); Christina E. Norland Audigier, *Starving Five to Prevent the Birth of One? An International Human Rights Analysis of Child Exclusion Provisions and the Failure of Federal and State Constitutional Challenges*, 77 TEMP. L. REV. 781, 816–17 (2004) (noting that the child exclusion policies of current welfare policies have been argued to discriminate against African-Americans); Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 LAW & SOC'Y REV. 813, 835 (2002) ("[L]argely ignored in the mainstream discourse is the history of discrimination—both overt and covert—experienced by African American families in the U.S. social welfare system.").

¹⁹⁵ See U.S. DEP'T HEALTH & HUMAN SERVS., *supra* note 194 (reporting that African-Americans constitute 36% of the families that receive Temporary Assistance for Needy Families (TANF) benefits); see also BETTER, *supra* note 179, at 92, 94 ("[T]here has been the conscious and unconscious manipulation of [public welfare] policies to reinforce white skin privilege and white supremacy."); NEUBECK & CAZENAVE, *supra* note 140, at 184–94 (giving examples of the implementation of racially discriminatory welfare policies in a number of states).

¹⁹⁶ *Bowen v. Gilliard*, 483 U.S. 587, 613 n.5 (1987) (Brennan, J., dissenting).

¹⁹⁷ *Id.* at 589 (majority opinion).

¹⁹⁸ *Id.* at 615 (Brennan, J., dissenting).

¹⁹⁹ *Id.* at 610.

lives of many families on welfare. The dissenting justices recognized that eliminating the ability of a father to provide child support could severely affect that child's well-being and the father's connection with the child.²⁰⁰ The dissent also recognized that this regulation would have a disproportionate effect on African-American families, not only due to the larger percentage of African-American families on welfare, but also because a high percentage of African-American families are headed by one parent.²⁰¹

Legislative changes to welfare laws that significantly overhauled the system, including the Personal Responsibility and Work Opportunity Reconciliation Act and Temporary Assistance for Needy Families, also disproportionately impact African-American families.²⁰² Scholars recognized

²⁰⁰ *Id.* at 619.

²⁰¹ *See id.* at 613 n.5. For scholarship discussing how various rules regarding child support and reimbursement of state outlays interact to break families apart, see generally Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children To the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007). Hatcher argues that the governmental policy of seeking reimbursement of welfare costs through child support enforcement often results in increased turmoil between family members when, for example, mothers are forced to repeatedly sue fathers to establish and enforce child support orders, and when fathers are alienated from their children (due to embarrassment or the desire to hide from enforcement efforts) when they cannot make child support payments. *Id.* at 1081. Hatcher also suggests that mothers may also be alienated from their children under this scheme when children see their mothers suing their fathers in court. *Id.*; Daniel L. Hatcher & Hannah Lieberman, *Breaking the Cycle of Defeat for "Deadbroke" Noncustodial Parents Through Advocacy on Child Support Issues*, 37 CLEARINGHOUSE REV. 5, 6 (May-June 2003) (discussing how the current child support system can harm families and explaining how supporting noncustodial parents is an antipoverty policy that benefits families).

²⁰² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of the U.S.C.). Many aspects of the legislation have a disproportionate impact on African-Americans, a few of which I discuss below. One is the so-called Gramm Amendment, which permanently denies cash assistance and food stamps to any person convicted of a felony offense that "has as an element the possession, use, or distribution of a controlled substance." *Id.* at § 115(a). Denying welfare benefits to persons convicted of drug crimes has a disproportionate effect on African-Americans and Latinos. *Recent Legislation: Welfare Reform—Punishment of Drug Offenders—Congress Denies Cash Assistance and Food Stamps to Drug Felons*, 110 HARV. L. REV. 983, 985 (1997).

Not only are members of these groups already overrepresented among the ranks of the poor, but the government officials responsible for enforcing drug laws focus disproportionate attention on African-American and Hispanic Communities. Although African-Americans make up only 12% of the U.S. population, they constituted 55% of the 280,000 people convicted of felony drug crimes in state court in 1992. Today, almost 90% of those individuals sentenced to state prison for drug possession are African-American or Hispanic. The combination of racial bias in law enforcement and poverty virtually guarantees that the weight of the Gramm

that the new welfare scheme, by requiring individuals on welfare to work without providing additional child care assistance, likely contributed to an increase in African-American children in foster care.²⁰³

B. *Family Law's Discriminatory Intent*

In the earlier discussion of child welfare and social welfare laws, this Article explored how laws that govern poor families disproportionately impact African-Americans. This section further explores how that disproportionate impact is not solely a function of statistics—it is also the case that our policies toward the poor, especially as shaped during the Great Society Era, were distorted to the extent that the poor were reconceptualized as undeserving and black. This distortion was fueled by racist sentiment and is at the core of policy decisions afflicting the (black) poor.²⁰⁴ As is discussed below, these policy decisions were reflected both in the passage of laws as well as in their implementation.²⁰⁵ Despite its impact on African-

Amendment will fall most heavily on African-Americans and Hispanics [and further destabilize African-American and Latino families].

Id. (footnotes omitted).

²⁰³ Roberts argues that welfare reforms are directly responsible for the reduction in impoverished mothers' ability to retain parental rights and have sharply increased the breakup of African-American families by forcing black children into foster care, and to a lesser extent, into the care of wealthier adoptive parents. ROBERTS, *supra* note 93, at 187–92.

²⁰⁴ See Haney López, *Post-Racial Racism*, *supra* note 1, at 1027–28 (placing racial stratification in context in a way that does not minimize other forms of racism).

²⁰⁵ See NEUBECK & CAZENAVE, *supra* note 140, at vii (concluding that the ease with which political elites abolished the primary safety net protecting poverty-stricken mothers and children would have been impossible if politicians, policy analysts, and the mass media had not “spent decades framing and morphing welfare into a . . . ‘black problem’”); Edelman, *supra* note 194, at 389 (discussing how welfare has been used as “a high-profile, racialized political issue” culminating in the passage of the 1996 welfare reform law); Risa E. Kaufman, *Bridging the Federalism Gap: Procedural Due Process and Race Discrimination in a Devolved Welfare System*, 3 HASTINGS RACE & POVERTY L.J. 1, 9 (2005) (finding “growing evidence that this increased discretion given to ground level workers introduces a significant risk of racial bias and discrimination influencing their individual determinations, particularly with regard to sanctioning and access to support services”); Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 177 (2003) (“The racial disparity in the child welfare system—even if related directly to economic inequality—ultimately results from racial injustice.”); Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL’Y 303, 320–21 (2006) (“The ASFA reveals . . . that Congress places no such value in maintaining the bonds between a black child and her biological parents. Deeply rooted stereotypes about black family dysfunction place no value on the relationship between poor, black parents and their children. . . . These racist

American families, this story has failed to make its way into the family law canon.

Much of the welfare and child welfare law that disproportionately impacts African-American families originated in the 1960s and 1970s during President Johnson's Great Society Era. At that time, the black Civil Rights Movement was at its apex in the United States.²⁰⁶ Scholars have documented virulent opposition to the War on Poverty because of its association with the Civil Rights Movement of the 1960s.²⁰⁷ In *The Color of Welfare: How Racism Undermined the War on Poverty*, Jill Quadagno shows that as the Civil Rights Movement shifted its focus from integration to economic justice, "crucial linkages" developed between the War on Poverty and the Civil Rights Movement such that "[p]rograms targeted to the poor, and especially the black poor, were rapidly subsumed by the civil rights movement."²⁰⁸ The confluence of the Civil Rights Movement, the War on Poverty, and the use of social programs to effectuate racial justice ultimately increased the backlash against social welfare programs, as they were associated with a controversial civil rights platform that was met with considerable hostility (particularly in the South).²⁰⁹

stereotypes about black family dysfunction are indiscriminately applied and make it difficult to imagine poor, black parents actually caring for their children. With legislation like the ASFA, the child welfare system becomes a misnomer. It focuses on punishing what white America has deemed 'disgraceful parenting' instead of deciding what is actually best for the child.").

²⁰⁶ See ROBERTS, *supra* note 93, at 16.

²⁰⁷ *Id.* See generally JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994).

²⁰⁸ QUADAGNO, *supra* note 207, at 28.

²⁰⁹ It is important to remember the historical context of the War on Poverty. Quadagno explains:

The New Deal represented a breakthrough toward a more social democratic, Keynesian welfare state. It also set in motion a great migration of blacks out of the South. The migration undermined the political compromise that had allowed the South to function as a separate nation and forced all Americans to confront the impediments to racial equality that had previously been considered "the southern problem." That confrontation occurred during the 1960s when the civil rights movement demanded that Americans live up to their political ideology and guarantee full democratic rights to all, regardless of race.

Id. at 188–89. In *When Affirmative Action Was White*, Ira Katznelson documents the political compromises that were made in the design and the administration of the War on Poverty, which ultimately reflected an accommodation of racial oppression. KATZNELSON, *supra* note 139, at 25–52. This accommodation was made, Katznelson explains, so that the way of life to which the South had been accustomed would not be disrupted, or as Harry Byrd, leader of Virginia's democratic machine, suggested, it would not disrupt the way that the South had dealt with the negro question. *Id.* at 4, 44. This

At the same time, liberalism came to mean something new. Instead of a universalistic conception that defined liberalism as a synecdoche for “intervention for the common good,” liberalism became associated with governmental intervention to protect the civil rights of African-Americans.²¹⁰

Nearly every social program—welfare, job training, community action, housing—became more than components of the welfare state that one supported or reviled depending upon whether one favored government intervention (a liberal) or opposed it (a conservative). Rather, because the reconstruction of race relations became inextricably woven into the very fabric of the Great Society, support for social programs came to mean support for integration. It also meant that if one opposed government intervention on behalf of civil rights, then one also opposed the social programs that helped enforce them.²¹¹

Support for the War on Poverty was initially high, but it waned when it became linked to civil rights.²¹² Sociologists have found that programs that are targeted to the poor get considerably more public support than programs targeted to African-Americans.²¹³ As Quadagno explains, because the War

legislation was shaped by what political scientist Robert Lieberman has called “‘discrimination by design’ by means of ‘race-laden’ provisions with the capacity and intent ‘to divide the population along racial lines without saying so in so many words.’” *Id.* at 44 (quoting Robert Lieberman); see ALEXANDER, *supra* note 143, at 43 (noting that although the New Deal programs benefited blacks disproportionately as they were disproportionately poor, they were “rife with discrimination in their administration”).

²¹⁰ QUADAGNO, *supra* note 207, at 195.

²¹¹ *Id.* Quadagno explains further:

The reconstruction of liberalism had concrete political consequences, for the War on Poverty activated the inherent conflict between positive and negative liberty. The positive liberties it extended to African-Americans were viewed by the working class as infringements on their negative liberties, the liberty for trade unions to discriminate in the selection of apprentices and to control job training programs; the liberty to exclude minorities from representation in local politics; the liberty to maintain segregated neighborhoods. The resentment these infringements triggered destroyed the New Deal coalition of northern wage workers and southern racial conservatives, the stable Democratic party base for three decades.

Id. Additionally, “[r]educing government intervention became a rallying point only when social programs threatened the negative liberties of white Americans.” *Id.* at 194.

²¹² *Id.* at 196.

²¹³ *Id.* at 172; see EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 31–32, 50 n.24 (2003) (discussing survey results showing substantial support among whites for government services assisting the poor but significantly less support for government programs benefitting blacks); Martin Gilens, *Racial Attitudes and Opposition to Welfare*,

on Poverty promoted racial equality, it "created a backlash against the welfare state."²¹⁴ During this time conservatives talked the game of equality but actively resisted its implementation in many areas; they routinely raised the issue of welfare, characterizing it as a contest between hard-working, tax-paying whites and undeserving, lazy, poor blacks who did not deserve the tax dollars of the hard-working whites.²¹⁵ Ultimately, the social welfare policies that developed during this time consciously regulated not only the poor, but explicitly African-Americans:

No program better exemplifies the racially divisive character of the American welfare state than Aid to Families with Dependent Children (AFDC). Conservatives attack AFDC for discouraging work and family formation and for rewarding laziness. Such comments are really subtly veiled messages about family structures and employment patterns among African Americans. However, often the attacks are neither veiled nor subtle.²¹⁶

Housing policies also changed when the War on Poverty became linked to civil rights, and federal subsidies "plummeted after 1968, when white homeowners, backed by the powerful real estate lobby, resisted residential integration."²¹⁷

This history of social welfare laws shows that these laws disproportionately affect African-American families because African-Americans are disproportionately poor and because these laws were explicitly designed to regulate African-Americans. And as the racial composition of welfare changed, the image of the welfare mother changed with it.²¹⁸ During the Progressive Era, the image of the welfare mother was a

57 J. POL. 994, 995 (1995); Mark Peffley et al., *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL. SCI. 30, 31 (1997).

²¹⁴ QUADAGNO, *supra* note 207, at 155.

²¹⁵ ALEXANDER, *supra* note 143, at 47.

²¹⁶ QUADAGNO, *supra* note 207, at 117. Quadagno explains that, "as the furor of the civil rights movement wound down, there was a widespread backlash against spending on social programs that benefited the poor, especially the black poor." *Id.* at 145-46.

²¹⁷ ROBERTS, *supra* note 93, at 16; *see* QUADAGNO, *supra* note 207, at 97-99, 101-02, 108, 113-15 (discussing the opposition of whites to government efforts to integrate housing as a part of the civil rights agenda, which resulted in a decrease in federally subsidized housing).

²¹⁸ ROBERTS, *supra* note 93, at 174-77; *see* Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 415 (1999) (noting that "as the complexion of the welfare population became darker . . . [a] less idealized image of motherhood . . . emerged"); Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1177-78 (1995) (stating that as states

worthy white widow who was on welfare so that she could attend to her maternal duties and take care of her children.²¹⁹ But the change in the racial composition of welfare brought with it a new welfare dependency stigma, work requirements, reduced benefits, and a new image of the welfare mother as the “immoral Black ‘welfare queen.’”²²⁰ As Michelle Alexander explains, “Black ‘welfare cheats’ and their dangerous offspring emerged, for the first time, in the political discourse and media imagery.”²²¹ As the public’s perception of welfare became increasingly associated with black mothers, it lost its popularity, became much less generous, and became a program that was focused on modifying the behavior of African-American mothers.²²²

The 1960s also saw race-based changes to child welfare policies that tracked the changes in the welfare system described above. As this country rejected a social welfare solution to poverty as the clientele became increasingly black, it similarly modified its child welfare system by reducing services to African-American families and by becoming considerably more punitive.²²³ In describing the passage of MEPA, Roberts explains:

became required to place black women on the welfare rolls during the 1960s, “the image of welfare mothers changed from worthy white widow to lazy African-American breeder”).

²¹⁹ ROBERTS, *supra* note 93, at 174; see NEUBECK & CAZENAVE, *supra* note 140, at 44, 45 (discussing the limitation of public assistance mostly to white widows who met high moral standards and kept a “suitable home” for their children); Brito, *supra* note 218, at 419–21 (discussing the Progressive Era women’s campaign to win welfare aid for deserving white widows and the near complete exclusion of black women).

²²⁰ ROBERTS, *supra* note 93, at 177; see BETTER, *supra* note 179, at 95 (arguing that the negative imagery of a black woman as a “welfare queen” served to justify cuts in welfare benefits); Brito, *supra* note 218, at 415 (calling the “devastating image [of the ‘Black Welfare Queen’] . . . instrumental in smoothing the way for conservative reformers to impose work requirements, strict time limits and other punitive reform measures on welfare mothers”).

²²¹ ALEXANDER, *supra* note 143, at 45.

²²² ROBERTS, *supra* note 93, at 268; see NEUBECK & CAZENAVE, *supra* note 140, at 132–40 (discussing the shift in public opinion about welfare recipients and the accompanying drop in value in welfare benefits and implementation of paternalistic policies aimed at controlling black welfare recipients); Williams, *supra* note 218, at 1177–79 (noting that once black women became the image of the welfare mother, welfare became less acceptable and federal legislators began to impose mandatory work requirements on women receiving welfare benefits).

²²³ ROBERTS, *supra* note 93, at 16; see LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 20 (1989) (linking the rise in foster care population to the “extension of child rescue activities to black children”); Mandel, *supra* note 161, at 1154–55 (finding a nexus between the blaming of black mothers receiving welfare benefits and the harsh treatment of poor black mothers in the child welfare system).

The passage of the federal adoption law corresponded with the growing disparagement of mothers receiving public assistance and welfare reform's retraction of the federal safety net for poor children. In the public's mind, these undeserving mothers—just like the unfit mothers in the child welfare system—are Black. . . .

. . . .

. . . Maternalist thinking no longer justifies public aid because the public views this aid as benefiting primarily Black mothers. The public devalues Black mothers' work in particular because it sees these mothers as inherently unfit and even affirmatively harmful to their children. There is little reason, then, to support their caregiving work at home. To the contrary, contemporary poverty discourse blames Black single mothers for perpetuating poverty by transmitting a deviant lifestyle to their children. Far from helping children, this view holds, payments to Black single mothers merely encourage this transgenerational pathology.²²⁴

Rather than societal failings, the situations of many African-Americans were reconceptualized as individual failings, due in part to policy driven by stereotypical notions of black people that have stubbornly persisted since slavery, through Reconstruction, and have continued to the present.²²⁵ The stereotypes of poor black women—whether as incompetent or pathological—are not new.²²⁶ Neither is the idea that stereotypes about black families being dysfunctional influence policy.²²⁷ Of particular relevance here are the

²²⁴ ROBERTS, *supra* note 93, at 173–79; see NEUBECK & CAZENAVE, *supra* note 140, at 34 (noting that under the image of the welfare mother, black women are “bad mothers” who “behave badly themselves and transmit the wrong values to their offspring”).

²²⁵ Thomas and Mary Edsall explain that in the late 1960s and early 1970s, there was a change from a belief that people's stations in life, specifically the poor, were due to structural inequalities to a belief that where people found themselves was due to individual failures and, thus, was not society's responsibility. THOMAS BYRNE EDSALL WITH MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 12–13 (1992).

²²⁶ ROBERTS, *supra* note 93, at 28; see GWENDOLYN MINK, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942, at 51 (1995) (noting that in the early twentieth century, “[t]he racial specificity of the Anglo American maternal ideal held Black women outside the boundaries of domesticity, as breeders, sluts, and the caretakers of other women's homes and children”); NEUBECK & CAZENAVE, *supra* note 140, at 45 (stating that “[g]endered racism [in the administration of welfare programs during the early 1900s] . . . invoked stereotypes of African-American women that harkened back to slavery, including their supposed laziness, immorality, and sexual promiscuity”).

²²⁷ ROBERTS, *supra* note 93, at 60–61 (exploring various stereotypes related to dysfunctional black families, including black mothers as inherently and pathologically unfit). In *The Black Family in Modern Slavery*, Peggy C. Davis and Richard G. Dudley

stereotypical images of the black mother.²²⁸

The images of black mothers' carelessness linger from slavery, where the so-called "Mammy" did not nurture or take care of her own children, but instead selflessly nurtured those of her master.²²⁹ The "matriarchal" family structure, or the proliferation of single, unwed motherhood being responsible for the disintegration of the black family, was a myth that some argue was supported by Daniel Patrick Moynihan's 1965 report, *The Negro Family: The Case for National Action*.²³⁰ In his report, Moynihan (then Assistant Secretary of Labor and Director of the Office of Policy Planning and Research under President Johnson) characterized black culture as a "tangle of pathology,"²³¹ which was pathological, in part, due to its matriarchal family structure that purportedly "seriously retards the progress" of African-Americans.²³² The welfare queen stereotype was also behind politics,

present a set of case histories that provide examples of how misguided understandings of African-Americans can result in destructive interventions into "viable family systems." Davis & Dudley, *supra* note 92, at 10. Such examples include whether it is the mischaracterization of black culture as "bizarre" or "schizophrenic," unjustified labeling of a black mother as "explosive" or "paranoid," or the lack of acceptance of kinship or fictive kinship systems commonly used in the black community. *Id.* at 11. Davis observes that "cultural and class blinders interfered with official judgments concerning the appropriate response to concerns about the welfare of Black children." *Id.* at 14.

²²⁸ ROBERTS, *supra* note 93, at 60–61; see MINK, *supra* note 226, at 51 ("Severe and pervasive prejudice meant that single, African American mothers were assumed to be morally unfit and uneducable—by definition 'unworthy[]' of receiving welfare benefits during the early twentieth century); NEUBECK & CAZENAVE, *supra* note 140, at 44, 45 (noting that black mothers were seen as unworthy of public assistance in the early 1900s due to the view that they were "incapable of being adequate caregivers").

²²⁹ ROBERTS, *supra* note 93, at 61. Roberts further explains how this view was reinforced after emancipation: "Whereas the virtuous white mother cared for the home and depended on her husband's wages, economic conditions forced many Black mothers to earn a living outside the home," and thus "[t]he ideal of motherhood . . . never applied to Black women and made them appear deviant and neglectful." *Id.* at 62; see also BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 84–85 (1981); DEBORAH GRAY WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* 46–61 (1985) (discussing the mythology of the black Mammy and debunking the notion that she was neglectful of her own family).

²³⁰ DANIEL PATRICK MOYNIHAN, U.S. DEP'T LABOR, OFFICE OF POLICY PLANNING & RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* ch. IV (1965), available at <http://www.dol.gov/oasam/programs/history/moynchapter4.htm>.

²³¹ *Id.*

²³² *Id.*; ROBERTS, *supra* note 93, at 63 ("According to Moynihan, 'At the heart of the deterioration of the fabric of the Negro society is the deterioration of the Negro family. It is the fundamental cause of the weakness of the Negro community.'"). Haney López notes that "Moynihan's deepest concern was the black family. It was the 'Negro family,' Moynihan asserted, that 'is the fundamental source of the weakness of the Negro community at the present time.'" Haney López, "A Nation of Minorities", *supra* note 14,

campaign strategies, and policy decisions during this time. Ronald Reagan, for example, rode the image of the welfare queen into office, which “became a not-so-subtle code for ‘lazy, greedy, black ghetto mother.’”²³³ In *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics*, the Edsalls explain that “one of Reagan’s favorite and most-often-repeated anecdotes was the story of a Chicago ‘welfare queen’ with ‘80 names, 30 addresses, 12 Social Security cards,’ whose ‘tax-free income alone is over \$150,000.’”²³⁴ This stereotypical mythological character was also fashioned by political scientist Charles Murray, who, in the 1980s argued that the option of welfare caused black women to forgo marriage, while at the same time, have more children to qualify for more welfare²³⁵—a claim that has been thoroughly refuted.²³⁶

at 1010; see also KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 33–34 (1997) (describing the report as supporting the notion that instead of black family behaviors being a consequence of poverty, they are a cause of poverty). While this Article takes issue with some of Moynihan’s conclusions, this Article does not mean to dismiss the report in its entirety as unfounded. To the contrary, some of the report’s conclusions should be taken seriously. For example, the report rightly documents pervasive personal prejudice against African-Americans, MOYNIHAN, *supra* note 230, at intro., and the inhumanity of slavery in the United States, *id.* at ch. III. Nonetheless, overall, this Article takes issue with the report’s largely negative characterization of families from lower-socioeconomic classes, as well as African-American families.

²³³ ALEXANDER, *supra* note 143, at 48; ROBERTS, *supra* note 93, at 64–67.

²³⁴ ALEXANDER, *supra* note 143, at 48 (quoting EDSALL & EDSALL, *supra* note 225, at 148).

²³⁵ CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980*, at 154–66 (1984).

²³⁶ Dorothy E. Roberts, *Irrationality and Sacrifice in the Welfare Reform Consensus*, 81 VA. L. REV. 2607, 2609 (1995) (noting that the claim that welfare incentivizes welfare recipients to have children “is refuted by empirical research and plain common sense”); see ROBERTS, *supra* note 93, at 65 (“It would be completely irrational for a mother on welfare to assume the tremendous costs and burdens of caring for an additional child given the meager increase in benefits that results. The vast majority of women on welfare have only one or two children.”); see also David T. Ellwood & Lawrence H. Summers, *Poverty in America: Is Welfare the Answer or the Problem?*, in *FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN’T* 78, 93–94 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986) (providing data showing that welfare did not affect the structure of black families); Sara McLanahan, *Charles Murray and the Family*, in *UNIV. OF WISCONSIN-MADISON, INST. FOR RESEARCH ON POVERTY, LOSING GROUND: A CRITIQUE* 1, 2–3 (1985), available at <http://www.eric.ed.gov/PDFS/ED263295.pdf> (providing statistical evidence showing that the unmarried birth rate among blacks actually “declined during the early seventies when welfare benefits were increasing”); *id.* at 4–5 (arguing that “the general decline in marriage, as well as the growth of female-headed families, is a response to broader social changes that began well before the dramatic rise in welfare benefits during the sixties”).

Some argue that animus against black mothers drove the discriminatory intent behind laws that govern families, such as the one challenged in *Bowen v. Gilliard*.²³⁷ More specifically, “the popular image of the welfare queen helped to drive the passage of child exclusion laws—or ‘family caps’—in a number of states, denying any increase in benefits to mothers who have children while already receiving public aid.”²³⁸ As those who have watched news reports with an eye for stereotypes and not-so-subtle racist images know, the public hates the welfare queen because she steals taxpayer money, is selfish, and cannot be trusted to spend the money on her children to whom her deviant lifestyle would pass.²³⁹ These stereotypes have maintained, albeit changing in form and sometimes name, over many decades. Stereotypes about black families that confirm that they must be treated differently and that justify state intervention as a means of protecting their children are prolific.²⁴⁰ And ultimately, these stereotypes drive social and child welfare laws that are intended to regulate African-American families and intrude into the family unit.²⁴¹

²³⁷ 483 U.S. 587 (1987).

²³⁸ ROBERTS, *supra* note 93, at 65; see NEUBECK & CAZENAVE, *supra* note 140, at 159–60 (suggesting that racialized conceptions of black welfare recipients led to the formation of family cap policies targeted at controlling their reproductive activities); Risa E. Kaufman, *The Cultural Meaning of the “Welfare Queen”: Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 308–12 (1997) (discussing how the stereotypical image of the “welfare queen” informs child exclusion policies).

²³⁹ ROBERTS, *supra* note 93, at 65; see PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 79 (2d ed. 2000) (noting that the black welfare mother “is portrayed as being content to sit around and collect welfare, shunning work and passing on her bad values to her offspring”); MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 97–101 (1999) (providing results of surveys showing negative public attitudes toward black mothers receiving welfare benefits).

²⁴⁰ ROBERTS, *supra* note 93, at 65 (explaining that stereotypes about “Black maternal unfitness . . . are reincarnated so persistently and disseminated so thoroughly that they become part of the unconscious psyche”); see Appell, *supra* note 161, at 585 (stating that the disproportionately black families interacting with the child protection system are viewed as “pathological, incompetent, and less worthy of preservation” by the system’s mostly white employees and agencies). See generally White, *supra* note 205 (arguing that the child welfare system through the ASFA devalues black families, infringes on the autonomy of black parents to raise their children, and perpetuates the racial oppression of the black community).

²⁴¹ Malcolm X famously “spoke with bitterness about the role of the state in the disintegration of his family.” Davis & Dudley, *supra* note 92, at 9. Malcolm recounts:

“When the state Welfare people began coming to our house . . . [t]hey acted and looked at . . . [my mother] and at us, and around in our house, in a way that had about it the feeling—at least for me—that we were not people. . . . My mother was,

Incidentally, the response to critics who would say that this Article (and this section in particular) has failed to provide sufficient evidence of racial motivation is, in part, that direct proof of racial motivation is not necessary to show discrimination. As this Article has discussed above, there is considerable evidence that race combines with broader inequities to break up black families disproportionately. But of course, today, it is hard to find direct proof of racism in news reports, in statements by caseworkers, or in judicial decisions. And, not only is it rare for racial motives to be articulated, but they are often subconscious.²⁴² There is overwhelming evidence that measurements of implicit attitudes of bias are often disassociated from explicit racial prejudice.²⁴³ So, even those who do not believe they harbor negative images and stereotypical notions of blacks—and do not want to

above everything else, a proud woman, and it took its toll on her that she was accepting charity. And her feelings were communicated to us. . . . She would talk back sharply to the state Welfare people, telling them that she was a grown woman, able to raise her children, that it wasn't necessary for them to keep coming around so much, meddling in our lives. And they didn't like that. But the monthly Welfare check was their pass. They acted as if they owned us. . . . As much as my mother would have liked to, she couldn't keep them out."

Id. (quoting MALCOLM X WITH THE ASSISTANCE OF ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 12–13 (1965)). Tellingly, "Malcolm X described the subsequent order making each of her eight children a ward of the state as 'Nothing but legal, modern slavery—however kindly intentioned.'" Davis & Dudley, *supra* note 92, at 10. Although this perspective is obviously not one of an objective disinterested observer, it is nonetheless important as "it serves to illustrate the other side of appropriate concern for troubled and impoverished black families." *Id.* at 10.

²⁴² See Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 144 (2004) (finding that both unconscious and conscious motives can lead to discrimination); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 516–17, 534 (1997); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741 (2005) ("[D]iscrimination is still pervasive, now more often in the form of stereotyping or unconscious bias."); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (suggesting that "subtle, often unconscious forms of bias[,] . . . represent today's most prevalent type of discrimination"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."). For a review of relevant social science literature on this point and its relevance to Federal Communications Commission (FCC) broadcast policy, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005).

²⁴³ Dovidio et al., *supra* note 242, at 531–36.

harbor such images—may not be free from subconscious bias.²⁴⁴ Just because we are not aware of a bias does not mean that it does not exist.

It is also important to consider that the existence of racism does not require that race be the only factor in a decision maker's mind and that it very rarely is. Government officials may be primarily motivated by a desire to protect children, but may also consider race in making an ultimate decision. Harvard Law School Professor Randall Kennedy has debunked a related argument in the context of racial profiling.²⁴⁵ Kennedy argues that race only being a marginal factor “cannot logically negate the *existence* of racial discrimination,” as “[t]aking race into account at all means engaging in racial discrimination.”²⁴⁶ It may also be argued that the disparate initial circumstances of blacks and whites negate the existence of any racism. The problem is that there is considerable evidence that the playing field is not level. This includes evidence of systemic and institutional discrimination in many areas, including employment, housing, education, and social services.²⁴⁷

C. Best Interests Test

Another example that shows that family law is not colorblind—and thus, that the relationship between family law and race should inform the family law canon—is the application of the best interests test in family law cases. Legal scholars suggest that race plays into determinations of custody in implicit and hidden ways, such as through a best interests test that is so vague

²⁴⁴ *Id.*; Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, in 6 GROUP DYNAMICS: THEORY, RESEARCH, AND PRACTICE 101, 111–12 (2002).

²⁴⁵ See ROBERTS, *supra* note 93, at 93.

²⁴⁶ *Id.* (quoting Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13 & 20, 1999, at 30, 32–33).

²⁴⁷ See Peter Edelman, *Where Race Meets Class: The 21st Century Civil Rights Agenda*, 12 GEO. J. ON POVERTY L. & POL'Y 1, 1 (2005) (noting the “persistence of structural racism—the racially disparate outcomes that occur in schooling, employment, housing, the criminal justice system, and elsewhere, and that, among other things, exacerbate the disproportionate poverty experienced by people of color”); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 261–65 (2009) (discussing the disproportionate role of race in drug law enforcement); Charles J. Ogletree, Jr., *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L. REV. 245, 256–57 (2003) (noting discrimination in education and housing); John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 802 (2008) (discussing the residential segregation of African-Americans and noting that “continued discrimination in the housing market, such as racial steering by realtors and predatory mortgage lending, limits housing opportunities for people of color”).

as to invite “race, class, and cultural bias upon judicial interpretation,”²⁴⁸ through court-ordered investigations by child protective services, and through the inherently biased process for custody determinations in New York’s family court system.²⁴⁹

While the best interests test is facially race-neutral, and is generally taught as if it is racially neutral, it is decidedly not post-racial. In his seminal book, *What’s Wrong With Children’s Rights*, Martin Guggenheim strongly criticized the best interests test as dangerously indeterminate, arguing that: “[a] best interests inquiry is not a neutral investigation that leads to an obvious result [and] is an intensely value-laden inquiry,”²⁵⁰ that “[o]nce the best interests test became the standard [in child custody disputes], there were no constraints on what the court was allowed to consider as relevant;”²⁵¹ and that “[t]he best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best.”²⁵² Of particular relevance to this Article, Guggenheim observed that “[a] child’s ‘right’ to limit parental authority only to those decisions that further the child’s best interests broadly authorizes state officials to oversee and control families.”²⁵³

This “value-laden inquiry,” as Guggenheim described it,²⁵⁴ invites racial bias into judicial decision making. For example, in the seminal case of *Santosky v. Kramer*²⁵⁵ in which the Supreme Court held that before a state terminates parental rights, the Due Process Clause of the Fourteenth Amendment requires that the State establish its allegations by at least “clear and convincing evidence,”²⁵⁶ Justice Blackmun, writing for the Court,

²⁴⁸ Fitzgerald, *supra* note 66, at 62.

²⁴⁹ Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—the Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 540–44 (2007).

²⁵⁰ MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 38–39 (2005). For a seminal article on the indeterminacy of the best interest standard, see Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975) (discussing the best interests test as a value-laden inquiry). Dorothy Roberts has a similar criticism of the child protection process: “In fact, the child protection process is designed in a way that practically invites racial bias. Vague definitions of neglect, unbridled discretion, and lack of training form a dangerous combination in the hands of caseworkers charged with deciding the fate of families.” ROBERTS, *supra* note 93, at 55.

²⁵¹ GUGGENHEIM, *supra* note 250, at 39.

²⁵² *Id.* at 40.

²⁵³ *Id.* at 247.

²⁵⁴ *Id.* at 39.

²⁵⁵ 455 U.S. 745 (1982).

²⁵⁶ *Id.* at 769.

recognized “the indeterminacy of the ‘best interests’ standard in the termination of parental rights, and that race, class, and cultural bias regularly taint child abuse and neglect adjudications, disproportionately subjecting poor and minority families to hostile state scrutiny of their family lives.”²⁵⁷ Scholars echo the same general refrain as Professor Guggenheim and the same specific refrain as the Supreme Court in *Santosky*. For example, one scholar argues that “[t]he ‘best interests of the child’ standard invites the same race, class, and cultural bias upon judicial interpretation as child abuse and neglect statutes,”²⁵⁸ and scholars point out “that the best interests of the child standard seem[s] to promote underlying biases regarding race, gender, culture, and family.”²⁵⁹ In short, the best interests standard, like child welfare and social welfare laws, is not colorblind and should inform the relationship between race and family law and the family law canon.

D. Because It Is Inaccurately Colorblind, the Family Law Canon Insulates Racism and Perpetuates Racial Inequality

It matters that the family law canon ignores the continued salience of race for African-American families because the idea of colorblindness immunizes racism and perpetuates racial inequality. In the context of family law, race functions as a form of social stratification. This fact is evident from the way in which race is instrumental to the misallocation of resources. Historically, the primary function of racial stratification was to rationalize exploitation.²⁶⁰ Slavery is the quintessential example of this theory.²⁶¹

²⁵⁷ Philip S. Welt, *Adoption and the Constitution: Are Adoptive Parents Really “Strangers Without Rights”?*, 1995 ANN. SURV. AM. L. 165, 220 (1995); see *Santosky*, 455 U.S. at 763 (“Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.” (citations omitted)).

²⁵⁸ Fitzgerald, *supra* note 66, at 62.

²⁵⁹ Jena Martin, *The Good, The Bad & The Ugly? A New Way of Looking at the Intercountry Adoption Debate*, 13 U.C. DAVIS J. INT’L L. & POL’Y 173, 194 (2007). In one article Marlee Kline engages in a very interesting discussion of how the best interest test in Canada facilitated the taking of Aboriginal children from their homes. See generally Marlee Kline, *Child Welfare Law, “Best Interests of the Child” Ideology, and First Nations*, 30 OSGOODE HALL L.J. 375 (1992).

²⁶⁰ Haney López, *Post-Racial Racism*, *supra* note 1, at 1041; see WILLIAM J. WILSON, POWER, RACISM, AND PRIVILEGE: RACE RELATIONS IN THEORETICAL AND SOCIOHISTORICAL PERSPECTIVES 24 (1973) [hereinafter WILSON, POWER, RACISM, AND PRIVILEGE] (noting the use of racial stratification by a dominant group “to exploit the labor of the minority group in order to increase or maximize rewards”); CARTER A. WILSON, RACISM: FROM SLAVERY TO ADVANCED CAPITALISM 17, 20 (1996) [hereinafter WILSON, RACISM] (arguing that an “exploitative and oppressive economic structure[]” is the basis for racial oppression).

Family law policies that destabilize and deconstruct African-American families, if not acknowledged, will continue to contribute to social stratification and deny African-Americans access to economic, political, and social resources. Some scholars argue that on some level this is deliberate: Professor Ian Haney López explains, “[i]n the post-civil rights era, . . . racial stratification seems principally concerned with protecting the wealth, power, and prestige already secured.”²⁶² What better way for those with the resources to maintain their privileged position than to destabilize the primary institution necessary for providing access to social, economic, and political opportunity—the African-American family?

The creation of racial categories here is accomplished through mechanisms that perpetuate structural racism—all of which are extant in the family law arena, including on the societal, institutional, and individual level.²⁶³ In a compelling and important discussion of “racial stratification,” Ian Haney López engages in a thorough discussion of the formation of racial categories, much of which is relevant to my argument here.²⁶⁴ Nonetheless, without attributing greater salience to one of these elements over the other, the mechanism that is the focus here is racial ideology and how racial ideology in the context of family law contributes to the formation of racial categories.

Various theories without any legitimate foundation,²⁶⁵ including white supremacist theories, have long justified the subjection of African-Americans and other individuals of color, and colorblindness has now emerged as a new

²⁶¹ Haney López, *Post-Racial Racism*, *supra* note 1, at 1041; see WILSON, POWER, RACISM, AND PRIVILEGE, *supra* note 260, at 24 (citing slavery as an example of exploitation through racial stratification); WILSON, RACISM, *supra* note 260, at 17–19 (discussing the economically exploitative basis of slavery).

²⁶² Haney López, *Post-Racial Racism*, *supra* note 1, at 1041 (“To be sure, wealth extraction continues today, and not just through inertia, but also in newly innovated guises such as the increasing exploitation of undocumented workers.”).

²⁶³ *Id.* at 1051–52. Trying to identify a precise reason for family law’s disproportionate effect on blacks, a single overriding cause, in other words, is a misguided enterprise given how institutional racism works. ROBERTS, *supra* note 93, at 97. Black families are broken apart “because of the interplay of societal, structural, and individual factors that feed into each other.” *Id.* As Dorothy Roberts explains, “To address the systemic discrimination against Black families, then, it is most helpful to attribute the disparity to a web of racial injustice that includes all of these causes.” *Id.*

²⁶⁴ Haney López, *Post-Racial Racism*, *supra* note 1, at 1051–68.

²⁶⁵ See, e.g., HOWELL COBB, A SCRIPTURAL EXAMINATION OF THE INSTITUTION OF SLAVERY IN THE UNITED STATES 25–75 (1856) (justifying slavery on the argument that Africans were the cursed descendants of Ham, son of the biblical figure Noah); WILSON, RACISM, *supra* note 260, at 74–75 (discussing pseudo-scientific theories about the biological inferiority of blacks that were used to justify their oppression in the eighteenth and nineteenth centuries).

racial ideology that can take their place.²⁶⁶ It is no longer acceptable to subjugate blacks based on explicit racial beliefs, but colorblindness is becoming institutionalized, obscuring the contextual power relations in society.²⁶⁷ African-American families are broken up by family law rules that bear no relation to racism, as colorblindness allows for rationalizations that reflect racial inequality as being the natural order of things. As Haney López suggests “[t]he seeming naturalness of racial inequality may support, and in turn be supported by, the colorblind proscription on race-talk, but it seems to be an independent, powerful aspect of racial commonsense.”²⁶⁸

Ignoring the role of race allows people to believe that the system is fair. It obscures the reality that differential treatment is rooted in racial privilege.²⁶⁹ By professing colorblindness, the family law canon ignores the reality that family law continues to disproportionately regulate African-American families and the reality that some family laws are designed to regulate African-American families. As a result of its inaccurate colorblindness, the canon immunizes racism because it sanctions the status quo, which is racially stratified.

III. THE CANON’S PERSISTENCE: WHY WE FAIL TO CHALLENGE IT

Having concluded that the family law canon is inaccurate in its colorblindness and that this inaccuracy hurts African-American families, this

²⁶⁶ Haney López, *Post-Racial Racism*, *supra* note 1, at 1063–64; see BONILLA-SILVA, *supra* note 213, at 2–3 (describing colorblind racism as the “dominant racial ideology” that perpetuates racial inequality today). See generally Amy E. Ansell, *Casting a Blind Eye: The Ironic Consequences of Color-Blindness in South Africa and the United States*, 32 CRITICAL SOC. 333 (2006) (describing the emergence of colorblindness as racial ideology).

²⁶⁷ Haney López, *Post-Racial Racism*, *supra* note 1, at 1061–62; see BONILLA-SILVA, *supra* note 213, at 3 (“[C]olor-blind racism serves today as the ideological armor for a covert and institutionalized system [of racial oppression] in the post-Civil Rights era.”); Ansell, *supra* note 266, at 333 (describing how colorblindness “serves in the post-segregation context to stall transformation of the racial order in the direction of greater equality”).

²⁶⁸ Haney López, *Post-Racial Racism*, *supra* note 1, at 1064; see BONILLA-SILVA, *supra* note 213, at 2 (arguing that due to colorblind racism, whites rationalize present-day racial inequality “as the product of market dynamics, naturally occurring phenomena, and blacks’ imputed cultural limitations”). See generally Ansell, *supra* note 266 (describing the evolution and development of contemporary colorblindness narratives).

²⁶⁹ ROBERTS, *supra* note 93, at 98. Quadagno identifies the implication of our failure to protect African-American families because of their race: “Yet the United States cannot protect its families as long as racial segregation remains a blemish on the American conscience and a contradiction of the American ethos.” QUADAGNO, *supra* note 207, at 186.

section explores some of the reasons why the canon's colorblindness is unchallenged. Given the negative consequences for families, why do family law scholars—both those who advocate color consciousness and those who advocate colorblindness—tend to oversimplify the precedent that addresses the role of race in family law? The answer to this question is complex, but one reason is the family law canon itself. The canon of family law reflects the colorblindness principle that many judges, lawyers, and scholars consider the premise of *Brown v. Board of Education*²⁷⁰ and *Shelley v. Kraemer*,²⁷¹ despite the more fundamentally sound view of the role of race in the law which is clearly articulated in more recent cases, such as *Loving v. Virginia*²⁷² and *Palmore v. Sidoti*²⁷³ (but also, ironically, in a fundamentally sound read of *Brown* itself). Nonetheless, it is what many consider the premise of *Brown* and *Shelley* that has found its way into the family law canon, and that makes it easy for conscientious scholars to oversimplify precedent. In other words, the idea that family law is colorblind has solidified itself in the minds of many judges, scholars, and practicing lawyers.

In both *Shelley* and *Brown*, on equal protection grounds, the Supreme Court rejected state action promoting racial discrimination against blacks.²⁷⁴ In *Shelley*, the Court held that judicial enforcement of racially restrictive covenants violated the Fourteenth Amendment's Equal Protection Clause,²⁷⁵ and that the purpose of the Fourteenth Amendment "was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."²⁷⁶

In *Brown*, the Court held that state-sponsored racial segregation in public education violated the Equal Protection Clause.²⁷⁷ In doing so, the Court observed:

"What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no

²⁷⁰ 347 U.S. 483 (1954).

²⁷¹ 334 U.S. 1 (1948).

²⁷² 388 U.S. 1 (1967). In this section, I offer one possible reading of these cases. For an important discussion of *Loving* as being the first decision to see colorblindness and segregation as compatible, see generally Rachel F. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 WIS. L. REV. 239 (2007).

²⁷³ 466 U.S. 429 (1984).

²⁷⁴ See *Brown*, 347 U.S. at 495; *Shelley*, 334 U.S. at 20.

²⁷⁵ *Shelley*, 334 U.S. at 20.

²⁷⁶ *Id.* at 23.

²⁷⁷ *Brown*, 347 U.S. at 495.

discrimination shall be made against them by law because of their color?"²⁷⁸

In *Shelley* and *Brown*, therefore, equal protection under the law meant the prohibition of state-sponsored racial discrimination and segregation. But over time, in the eyes of many judges, scholars and lawyers, the premise of these cases has become one of colorblindness, and this premise is now taken to require no reappraisal.²⁷⁹ Haney López laments:

The particular rationales for treating affirmative action and Jim Crow alike increasingly matter less and less: it's now simply our constitutional law, an Equal Protection bromide strenuously asserted but rarely defended—as when Justice Thomas emphatically declares that “laws designed to subjugate a race” and those that “foster some current notion of equality” are, in each instance, “racial discrimination, plain and simple.”²⁸⁰

In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court confirmed that it takes colorblindness as the premise of these cases, interpreting *Brown* as requiring an adherence to colorblindness.²⁸¹ According to the majority, a strict adherence to *Brown* would require that even benign racial classifications should be struck down, as the use of race in classification is always invidious.²⁸² In every case and in every context, this would seem to be true. Or, in the now oft quoted words of Chief Justice Roberts, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁸³

The legacy of *Shelley* and *Brown*, this Article suggests, is the ideal of colorblindness as a social objective, where colorblindness means the promotion of racial equality and the disapproval of any state action making distinctions based on race. But the idea that we are no longer permitted to make distinctions about people based on their race ignores the persistence of race as a basis for social stratification. Nonetheless, this Article's main objective is not to argue that as a normative matter the law should (or should

²⁷⁸ *Id.* at 490 n.5 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307–08 (1880)).

²⁷⁹ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752 (2007) (consolidating two cases brought by parents challenging the integration programs in school districts in Jefferson County, Kentucky, and Seattle, Washington); Haney López, “*A Nation of Minorities*”, *supra* note 14, at 1063.

²⁸⁰ Haney López, “*A Nation of Minorities*”, *supra* note 14, at 1063.

²⁸¹ *Parents Involved*, 551 U.S. at 747–48.

²⁸² See *id.* at 752 (Thomas, J., concurring); Jess Bravin & Daniel Golden, *Court Limits How Districts Integrate Schools: Race-Based Policy Ban Augurs Broad Changes; Clash Over Brown Case*, WALL ST. J., June 29, 2007, at A1.

²⁸³ *Parents Involved*, 551 U.S. at 748.

not) be used to overcome past racial harms and to create a non-racially stratified and non-socially stratified society. What is important to emphasize for the purposes of this Article is that it is what many consider the premise of *Shelley* and *Brown* that has found its way into the family law canon, and that makes it easy for conscientious scholars to oversimplify precedent. In other words, the idea that the family law canon is colorblind has solidified itself in the minds of many judges, scholars, and practicing lawyers. Instead, the family law canon should adopt a more nuanced and fundamentally sound view of these cases, perhaps like the Court's reading of the Constitution in *Loving* and *Palmore*.

In both *Loving* and *Palmore*, the Court was concerned about invidious racial classifications.²⁸⁴ As in *Shelley* and *Brown*, the use of race in *Loving* and *Palmore* was pernicious and had the purpose of entrenching the subordination of blacks and giving legal effect to racial prejudice, but the Court's view in these latter cases is one that a careful reading shows is more nuanced than one based solely in colorblindness. In *Loving*, the Court expressed the need to eliminate state-sponsored "invidious racial discrimination,"²⁸⁵ asserted that such racial classifications were "designed to maintain White Supremacy,"²⁸⁶ and stated that the Equal Protection Clause required "that the freedom of choice to marry not be restricted by invidious racial discriminations."²⁸⁷ And in *Palmore*, the Court noted that racial classifications tended to "reflect racial prejudice,"²⁸⁸ and maintained that the Equal Protection Clause prohibited the law from giving effect to private racial biases.²⁸⁹

The family law canon, in response, promoted colorblindness.²⁹⁰ If the above quoted excerpts were all that there was to these cases, this view might be right. But in *Loving* and *Palmore*, the Court's holding was more nuanced than a reading steeped in the common perception of *Brown* and *Shelley* might reveal. In *Loving*, the Court took issue with the fact that the State of Virginia's antimiscegenation statute was based *solely* on race.²⁹¹ Also, in

²⁸⁴ *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Loving v. Virginia*, 388 U.S. 1, 10-12 (1967).

²⁸⁵ *Loving*, 388 U.S. at 10.

²⁸⁶ *Id.* at 11.

²⁸⁷ *Id.* at 12.

²⁸⁸ *Palmore*, 466 U.S. at 432.

²⁸⁹ *Id.* at 433-34.

²⁹⁰ See Hasday, *The Canon of Family Law*, *supra* note 13, at 857 (discussing how family law scholars use *Loving* as a canonical example to argue that "family law no longer draws [racial] distinctions between families. . . . [and] no longer bans 'color-blind romance'" (footnote omitted)).

²⁹¹ *Loving*, 388 U.S. at 11.

Palmore, the Court rejected the state court's ruling because race was the *only* factor in the court's custody decision.²⁹² Thus, *Loving* and *Palmore* suggest that the Court was of the view that race can be a factor, although not the sole factor and never an invidious one, in state action determining how to structure families. These cases suggest that the canon of family law is not actually colorblind or post-racial.

The same applies to *Brown*, of course, notwithstanding the fact that this decision is commonly read in a colorblind way. In *Brown*, the Court in no way embraced an anticlassification conception of the Constitution. At the time that *Brown* was decided, only black children were struggling to attend white schools²⁹³ and consequently, the promise of *Brown* was racial integration, which was to be accomplished by *racially conscious* solutions to integrate public schools that were resisting integration and were discriminating against African-Americans.²⁹⁴ A more nuanced reading of *Brown* suggests that race-consciousness in certain circumstances is consistent with the Equal Protection Clause of the Fourteenth Amendment. In his dissent in *Parents Involved*, Justice Breyer explained: "[S]ince this Court's decision in *Brown*, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures,"²⁹⁵ and recognized that the race-consciousness had "been accepted by every branch of government and is rooted in the history of the Equal Protection Clause

²⁹² *Palmore*, 466 U.S. at 432.

²⁹³ See, e.g., J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 11 (1979) ("Everyone understands that *Brown v. Board of Education* helped deliver the Negro from over three centuries of legal bondage."); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960) ("History, too, tells us that segregation was imposed on one race by the other race; consent was not invited or required. Segregation in the South grew up and is kept going because and only because the white race has wanted it that way—an incontrovertible fact which in itself hardly consorts with equality.").

²⁹⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 483–95 (1954); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting) (recognizing that the Constitution permits race-conscious desegregation plans that are narrowly tailored); *id.* at 862–63 (Breyer, J., dissenting) ("[T]he Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria."); *id.* at 864 (Breyer, J., dissenting) ("[S]ince this Court's decision in *Brown*, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures . . ."). This reading of *Brown* was supported by dozens of subsequent cases in which school districts were told to engage in race-conscious practices. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455 n.3 (1979); *Davis v. Bd. of Sch. Comm'rs*, 402 U.S. 33, 37–38 (1971); *Green v. Cnty Sch. Bd.*, 391 U.S. 430, 441–42 (1968).

²⁹⁵ *Parents Involved*, 551 U.S. at 864 (Breyer, J., dissenting).

itself.”²⁹⁶ Notwithstanding what this nuanced reading of *Loving*, *Palmore*, and *Brown* suggests about the place of colorblindness in family law, the notion of colorblindness exists.

As a normative matter, modern courts have insisted that race should not count in a discriminatory way against African-Americans. Not unrelated, but quite separate, is the issue of whether racial remedies should be permitted to overcome past harms and create a non-racial legal and social reality. This Article does not aim to resolve whether colorblindness is a good norm or is a willful means to protect white supremacy. My goal here is much more modest: I aim to point out a deep omission in the family law canon.

Many social scientists have studied the persistence of the notion of colorblindness. Some attribute the desire of many people to see this society as post-racial to the absolution of racial guilt. In other words, some argue that white people may embrace colorblindness because it absolves them of guilt, even though, in reality, discrimination, racism, and othering processes exist.²⁹⁷ A corollary argument is that the belief in a colorblind society makes it easier for people to believe that they are doing their part for race relations, even though they do not live among, go to school among, socialize among, or work alongside African-Americans. This has been described as the “production of white innocence [that is necessary] for the realization of a ‘post-racial’ . . . politic.”²⁹⁸ And, as Haney López argues, colorblind governmental policies ostensibly facilitate the defense of racially privileged

²⁹⁶ *Id.* at 828 (Breyer, J., dissenting). In coming to this conclusion, Breyer found evidence of race-consciousness in over fifty-one federal statutes that used racial classifications, over 100 state statutes, actions of presidential administrations for the past half-century, and actions of local school districts. *Id.* at 828–29 (Breyer, J., dissenting).

²⁹⁷ “Othering” refers to using the other to define oneself. See Shani King, *Challenging MonoHumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT’L L. 413, 426 & n.52 (2009). One of the first proponents of this idea was the German philosopher, G.W.F. Hegel. See G.W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* 214–67 (J. B. Baillie trans., rev. 2d ed. 1949). In more recent times, this term has been adopted by post-colonialist scholars to critique analytical structures “that identify previously colonized peoples through binary opposition structures that reflect a hierarchical inferiority.” King, *supra*, at 426. And, “[a]ccording to [those] analytical structures, the post-colonial is an antipodal and lesser ‘other,’ essential for creating the Western identity of ‘self’ as the normative center.” *Id.* Edward Said’s book, *Orientalism*, is generally accepted as the founding work of post-colonial studies. *Id.* at n.51. Post-colonialist approaches have been used to analyze intercountry adoption, see, e.g., *id.* at 426–52 (using a post-colonialist framework to critique law review discourse on intercountry adoption), and the juvenile justice system, see, e.g., Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 682 (2002) (discussing “treatment of African American children as the ‘other’ in the juvenile justice system”).

²⁹⁸ Robert Westley, *First-Time Encounters: “Passing” Revisited and Demystification As a Critical Practice*, 18 YALE L. & POL’Y REV. 297, 339 (2000).

stratification.²⁹⁹ Whatever its origins, colorblindness is becoming institutionalized, which obscures context and power relations related to race.³⁰⁰ As a result, African-American families are broken up by family law rules that ostensibly bear no relation to racism, as colorblindness allows for rationalizations that reflect racial inequality as being the natural order of things.³⁰¹ After all, if we convince ourselves (as we did during the War on Poverty) that racial inequality results from individual failings and not race, we convince ourselves that racial inequality is acceptable.³⁰²

IV. CONCLUSION

The family law canon determines what is considered family law. This, in turn, affects the nature and the scope of family law debates among scholars and practitioners. It determines which questions are legitimate questions in a family law debate and shields certain laws and their effects from scrutiny. Because of their very nature, canons are difficult to alter, but it is up to professors, teachers, and scholars to transmit questions, doubts, and arguments about the family law canon to colleagues and successive generations of law students.³⁰³

As discussed above, the family law canon fails to scrutinize race-based disparities in laws, procedures, and outcomes, and that omission feeds a mistaken notion of a race-blind or a post-racial society. One consequence of this omission is that it obscures race-based decision making by legislatures, judges, legal reform organizations, legal scholars, lawyers, and child welfare workers, and thereby immunizes race-based decision making from scrutiny. In other words, since the family law canon inaccurately describes family law as post-racial, or colorblind, the canon immunizes racism and perpetuates racial inequality.

²⁹⁹ Haney López, *Post-Racial Racism*, *supra* note 1, at 1041, 1064–65.

³⁰⁰ *Id.* at 1061.

³⁰¹ *See id.* at 1064–65.

³⁰² Some argue that African-Americans who refuse to move beyond racism and get on with their lives are engaging in self-defeating “victimology,” and have characterized blacks refusing to get beyond race as engaging in “*therapeutic alienation*: alienation unconnected to, or vastly disproportionate to, real-life stimulus, but maintained because it reinforces one’s sense of psychological legitimacy, via defining oneself against an oppressor characterized as eternally depraved.” JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 1–49 (2000); JOHN MCWHORTER, *WINNING THE RACE: BEYOND THE CRISIS IN BLACK AMERICA* 6 (2005); *see also* SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 45 (1990). These are complicated psychological and sociological phenomenon that this Article will not address at length.

³⁰³ *See* Hasday, *The Canon of Family Law*, *supra* note 13, at 898–99.

The race question is so important to discuss honestly in the context of family law scholarship and education because of the power of attorneys in the United States and the impact that their work can have on the lives of families. On one level, of the three branches of government, the Judiciary is almost exclusively comprised of attorneys. And on the other, it is largely attorneys who pass laws in the Legislative Branch, lobby to get these laws changed, challenge the constitutionality of these laws, and represent the families who are subject to these laws.

Challenging the canon will highlight its colorblind perspective and reveal the extent to which precedent allows color consciousness in family law, whether it is a situation in which not acknowledging the role of race in family law perpetuates racial inequality, or it is a situation in which not acknowledging the role of race means not fully considering the best interests of children. Challenging the canon will call attention to the ways in which race is still a significant factor in society, in how people arrange their private lives and families, and in the law that governs these families.

Challenging the canon will help us have an honest discussion about the race-consciousness that is currently present in family law and in lesson plans, scholarship, and casebooks. For example, what racial ideologies are being promoted in these materials? Ones that support certain forms of race blindness, while allowing other forms of race-consciousness? For instance, blindness regarding the adoption of minority children, but race-consciousness regarding the adoption of white children? Or more pointedly, why do casebooks reject references to biology, but encourage discussion of culture—as in, the culture of poverty? Is the colorblindness in family law the “reactionary colorblindness,” discussed by Ian Haney López, which is the result of a reactionary ideology of group difference that has been invoked to “utterly displace any attention to the on-going dynamic of status subordination and the continued necessity of social reconstruction”?³⁰⁴ In other words, are our family law casebooks a tool in the promulgation of colorblindness as a specific racial ideology?

For now, professors and scholars should challenge the canon for the benefit of honest academic debate and for the families for whom canons have real consequences. The longer we refuse to include the “American Dilemma”³⁰⁵ in conversations about family law, the longer we will continue to promote racial inequality.

³⁰⁴ Haney López, “*A Nation of Minorities*”, *supra* note 14, at 1011.

³⁰⁵ This term was coined by Gunnar Myrdal, a Swedish economist, and is taken to refer to historical and current race-based oppression of blacks by whites. *See generally* GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

Thus, this author invites legal scholars to continue this dialogue. While legal scholars surely reflect on the canon in the process of creating lesson plans, producing scholarship, and compiling casebooks, the decisions they make throughout the process are implicit—we can only see the product of their deliberations. This author's hope is that we can continue, as family law scholars, to contribute to this process in an explicit way so that we understand exactly how we are transmitting the canon to our students and our successors. It is up to us to reshape the family law canon through our scholarship and teaching. We cannot, after all, change judicial decisions or modify or repeal statutes by individual fiat. Thus, it is our scholarship and our teaching that will shape how future generations of lawyers talk, think, and understand the law that governs families. Introspection of this sort may result in a more race-conscious approach for family law casebooks that does not obscure the connection between race and family law. One form this may take is a new set of chapters within family law textbooks on race and the family. Such chapters might, for instance, explicitly bring forward the theme that we have moved from explicitly racist laws to laws that have racialized content that is more subtle and hidden, but nevertheless should be of concern to lawyers and scholars.

APPENDIX: A FEW SUGGESTED TEACHING MATERIALS TO CONTRIBUTE
TO A RACE-CONSCIOUS FAMILY LAW CANON

1. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988).
2. HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925* (1976).
3. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003).
4. RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001).
5. KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* (2001).
6. JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (2d ed. 2001) (Appendix A: Three Systems of Family Law: A Preliminary Historical Investigation).
7. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).
8. CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974).
9. R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998).
10. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991).
11. Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453 (2002).
12. Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187 (1987).

13. Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Slavery?*, 4 HARV. BLACKLETTER J. 9 (1987).
14. Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. ON POVERTY L. & POL'Y 389 (2004).
15. Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541 (2001).
16. Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010).
17. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004).
18. A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 WASH. U. L.Q. 673 (1989).
19. Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131 (1995).
20. R.A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp*, in RACE LAW STORIES 343 (Rachel F. Moran & Devon W. Carbado eds., 2008).
21. Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1 (2008).
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